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ABSTRACT

This study is a comprehensive analysis of issues concerning marijuana that are of importance to state policy makers. It reviews the medical, legal, and historical dimensions of marijuana use and examines the range of policy approaches toward marijuana possession and use which state officials have considered. Attention is directed to the experience of eight states that have eliminated incarceration as a penalty for private possession of small amounts of marijuana as well as to the experience of states that have not passed such decriminalization laws. The study provides a comprehensive, independent, and objective analysis of the issues under examination. It does not, however, make policy recommendations but instead leaves the evaluation of data and development of specific policy options to state officials. The assessment of the experience with the recently-passed decriminalization laws is based on the best data now available rather than on trend data or longitudinal analysis. Further assessments, based on more substantial and longer-term data, will determine whether or not the impact of the new laws over time on the criminal justice and health care systems and on wage is consistent with the patterns observed to date. (Author)

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MARIJUANA
A Study of State Policies & Penalties

CG 012471

National Institute of Law Enforcement and Criminal Justice
Law Enforcement Assistance Administration
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A Study of State Policies & Penalties

By National Governors' Conference
Center for Policy Research and Analysis

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MARIJUANA
A Study of State Policies & Penalties

Part One
Research and Case Studies

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FOREWORD

Marijuana: A Study of State Policies and Penalties is a comprehensive analysis of issues concerning marijuana that are of importance to state policymakers. The study reviews the medical, legal, and historical dimensions of marijuana use and examines the range of policy approaches toward marijuana possession and use which state officials have considered. Attention is directed to the experience of eight states that have eliminated incarceration as a penalty for private possession of small amounts of marijuana as well as to the experience of states that have not passed such decriminalization laws.

Governor Brendan T. Byrne of New Jersey proposed in 1975 that this study be initiated to provide state policymakers with better information on issues concerning marijuana. The Executive Committee of the National Governors' Conference authorized the NGC Center for Policy Research and Analysis to undertake the study. The Center obtained financial support from the National Institute of Law Enforcement and Criminal Justice of the Law Enforcement Assistance Administration and selected the firm of Peat, Marwick, Mitchell & Co. to conduct the study. An expert Interdisciplinary Review and Assessment Panel provided guidance and quality control throughout the research process.

Two aspects of the study should be emphasized at the outset. First, the study provides a comprehensive, independent, and objective analysis of the issues under examination. It does not, however, make policy recommendations, but instead leaves the evaluation of data and the development of specific policy options to state officials. Second, the assessment of the experience with decriminalization laws, which have been passed only recently, is based on the best data now available rather than on trend data or longitudinal analysis. Further assessments, based on more substantial and longer-term data, will determine whether or not the impact of the new laws over time on the criminal justice and health care systems and on usage is consistent with the patterns observed to date.

The efforts of many persons have made this study possible, including the PMM&Co. study team and the Interdisciplinary Review and Assessment Panel. John Lagomarcino of the NGC staff has made major contributions. The counsel of Dr. Helen Erskine of the National Institute of Law Enforcement and Criminal Justice has also been of great benefit.

Stephen B. Farber, Director
National Governors' Conference

PREFACE

There has been no Governor of any state in the nation over the past decade who has not felt some pressures--and often very strong pressures--to enact some change or other in the law affecting the use and possession of marijuana.

It is to help present and future Governors deal with these pressures knowledgeably and reasonably that I proposed this study and the National Governors' Conference Executive Committee agreed to undertake it. The study was underwritten by the Law Enforcement Assistance Administration.

There is an abundance of literature on what marijuana is and isn't and on the medical and sociological results of its use. We have not attempted any exhaustive evaluation of these questions, other than to summarize that body of literature.

We have instead focused attention on the experience of several states that have taken or attempted action of one kind or another to deal with the problem. In eight states the legislature has changed the law to decriminalize the use or possession of small quantities of marijuana; in one of those states the court also mandated a change in approach.

Even Governors who have no intention of initiating action with their legislatures in this area may have to anticipate a court-mandated reevaluation of the situation.

This report is an attempt to evaluate how and where the legal approach to marijuana use and possession has changed; what the measurable effects of those changes have been on law enforcement and other government functions in the state making the change; and what sort of response by the executive branch appears to be necessary or advisable in order to cope with those changes successfully.

I hope that this study will prove to be a useful tool in the hands of Governors who will be coming to grips with changes in this area in the years ahead.

Brendan T. Byrne
Governor of New Jersey

ACKNOWLEDGMENTS

Peat, Marwick, Mitchell & Co. conducted this study for the National Governors' Conference under funding provided by the Law Enforcement Assistance Administration of the Department of Justice. The written contributions of Professor Richard J. Bonnie of the University of Virginia School of Law, and Dr. Peter G. Bourne, appointed since the study as a Special Assistant to President Carter, are acknowledged in the reports. In addition, we would especially like to express our appreciation and give appropriate recognition to two members of the PMM&Co. study team: Morten Engstrom, who as lead consultant on the study labored long and hard in the research, field interviews, and compilation of drafts; and Judith A. Cass, the PMM&Co. technical editor, who perspicaciously refined the drafts into final form.

Raymond T. Olsen, Project Director

Lawrence S. Herman, Project Manager

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INTRODUCTION

This volume provides a compilation of the various technical research efforts conducted by the PMM&Co. project team and outside consultants, Drs. Richard J. Bonnie and Peter G. Bourne. The purpose of this volume is to document the research findings that were the basis for the analytical work in Volumes 1 and 2, which by their very nature required the development of conclusions and the distillation of impressions and opinions.

Based upon the preliminary findings and tasks, the Interdisciplinary Assessment and Review Panel (consisting of representatives from the National Governors' Conference and the Law Enforcement Assistance Administration, in addition to project team members) decided to include the full documentation rather than limit the volume to a summary of findings. We believe that the more complete documentation, particularly with respect to the case studies, will prove of interest and value to legislators, Governors' staffs, and state policymakers during their consideration and analysis of alternative approaches and policies to marijuana enforcement.

The objectives and potential users of each of the five major chapters of this volume are summarized below.

CHAPTER I: THE HISTORICAL DIMENSION

This chapter briefly summarizes the social and cultural evolution of marijuana attitudes and use in the United States. The purpose of the chapter is to provide the reader with historical background that may be relevant in considering the issue rather than a complete and fully documented history of use (and abuse) and enforcement patterns.

CHAPTER II: THE CURRENT DIMENSION

As would be expected, the amount of statistical data available on marijuana supply, use, and enforcement is substantial and often contradictory and confusing. The purpose of this chapter is to provide the state policymaker with a general background of use and enforcement trends. Therefore the statistics thought to be the most objective and reliable are summarized.

CHAPTER III: THE MEDICAL/HEALTH DIMENSION

A rational discussion of the marijuana issue requires an understanding of the medical and scientific issues involved and the results of prior, current, and ongoing research. Unfortunately for the state policymaker, discussions of these issues are often in highly technical and scientific terminology. To some degree, this chapter presents a similar problem to the reader, simply because of the nature of the issues being discussed. Nevertheless, we believe that this chapter will be of potentially significant use to medical and scientific personnel advising state policymakers. The purpose of this chapter is to provide a relatively complete summary of research results, outstanding questions, and sources of additional information.

CHAPTER IV: THE LEGAL DIMENSION

The objective of this chapter is to bring together four aspects of the legal dimensions of the issue: international law and policy, state control legislation, state record maintenance issues, and the constitutional dimensions. This chapter not only provides a current compilation of legislation but also highlights some of the more significant legal issues that need to be considered in evaluating the issue.

CHAPTER V: CASE STUDIES

This chapter provides the written summaries of the nine site visits conducted to review the process by which selected states considered and analyzed the marijuana issue. The states were selected by the Interdisciplinary Assessment and Review Panel and represent states which both implemented and did not implement significant change in laws covering personal possession and use of marijuana. In addition, three states (California, Texas, and Ohio) were selected for a more intensive assessment of the impact of change.

APPENDIX: RESEARCH METHODOLOGY

The research methodology used to conduct the study is briefly summarized in the appendix to this volume.

I. THE HISTORICAL DIMENSION

This section summarizes the historical dimension of the use of marijuana, provides a perspective on the changing social and cultural attitudes involved, and describes recent legislative and political developments.[1]

THE EARLY YEARS: AN OVERVIEW

Cannabis sativa, also called marijuana and Indian hemp, has been used since antiquity as a source for several products: the fiber was used for rope and cloth, the seeds for oil and birdfood, and the leaves and resin for medicine and intoxicants.

Cannabis was brought to the United States by the first European settlers, who planted it in Jamestown in 1611. Indeed, the early settlers were required by their contracts with the Crown's Virginia Company to grow cannabis. The fiber of the plant was used primarily, and by 1630 as much as one half of the clothing worn by the colonists was made from hemp.[2] The fiber was also used in twine, rope, paper, blankets, and canvas (which derives its name from cannabis). Hemp was so important to the colonists that in 1762, Virginia imposed penalties on those who did not cultivate it. The importance of cannabis to the colonists is also evidenced by George Washington's diaries, which discuss the cultivation of cannabis. Little, however, is known about use of the plant during this period for its psychoactive powers.

American hemp culture reached its peak in the early 19th century. With the development of the cotton gin, cotton gradually replaced hemp as the primary substance for cloth, and with the increasing availability of imported jute, the American hemp industry declined.

The industry, however, did not disappear completely. As late as 1937, an estimated 10,000 acres of cannabis were commercially cultivated, primarily in Kentucky, Wisconsin, and Illinois.[3] During World War II, the U.S. Department of Agriculture encouraged stockpiling homegrown hemp when the supply of rope fiber from the Philippines was cut off by the Japanese occupation.

Marijuana gained popularity as a therapeutic agent in the last half of the 19th century, when it was widely recommended in medical journals, and sold by pharmaceutical houses. Some artists and writers during this period, inspired by European writers such as Baudelaire and Dumas père, used marijuana as an intoxicant, but such use was almost certainly not widespread.

THE EARLY 20TH CENTURY: THE BEGINNINGS OF CONTROL

It is not clear when more extensive use of marijuana as a psychoactive substance began in the United States although the drug is known to have been used in Mexico and the Caribbean for many years as a psychoactive substance. Cannabis entered the United States from Mexico and the Caribbean in the first years of this century, in part through soldiers and travelers, but primarily through immigrants. Newspaper and police reports from localities where Central American laborers worked (i.e., from New Orleans through the Southwest and into the Rocky Mountain states to Montana) contained references to marijuana use.

The early 20th century was an era of intense interest in social reform, including limitation of the use of intoxicants. The most obvious example is the temperance movement that culminated in 1919 with the passage of the 18th amendment to prohibit the sale, manufacture, and transportation of intoxicating liquors. In addition, the Harrison Act of 1914 required the registration and payment of an occupational tax by all who imported, produced, dealt in, sold, or gave away opium and coca leaves and their derivatives.[4] Personal possession without a prescription was presumptive evidence of violation. The Harrison Act, however, was a tax act rather than a prohibitory statute because of Congressional doubt as to its authority to directly regulate the intrastate possession and sale of narcotics. Although a few advocates attempted to include marijuana in the Harrison Act, national ignorance of marijuana and pressure from the pharmaceutical industry prevented its inclusion.

Although federal legislation concerning marijuana did not exist, a number of states passed their own prohibitions; and by 1931, 29 states had laws prohibiting the use of marijuana. Most of these state laws were a response either to pockets of widespread use among Mexicans and other minority groups, or to a fear that "addicts" would move from use of other prohibited drugs to marijuana.

In 1924, the National Conference of Commissioners on Uniform State Laws appointed a committee to draft a uniform drug act. Substantial disagreement existed as to whether marijuana should be prohibited. Supporters of the inclusion, of whom the most important was

Harry Anslinger (appointed Acting Commissioner of the Federal Bureau of Narcotics in 1930), argued that marijuana was physically dangerous, led to insanity, corrupted youth, and was of little medical value. Opponents to the inclusion, primarily the pharmaceutical industry and key members of the American Medical Association, argued that the drug was not addictive, not significantly abused, and certainly not worth inclusion in the uniform narcotic laws.

A compromise was reached in the final Uniform Drug Act which was approved by the Commissioners in October 1932. Marijuana prohibition was omitted from the main body of the act. However, the states could include marijuana prohibition through two alternatives: (1) an optional provision could be attached to the act, or (2) cannabis could simply be added to the definition of narcotic drugs. As a result of this second option, marijuana was eventually classified as a "narcotic" in every state.

In spite of the active support of Anslinger and the Federal Bureau of Narcotics, few states were interested in the Uniform Drug Act during the first years of its existence. By March 1935, only 10 states had enacted it. The primary objections appear to have been concern over the potential cost of enforcing the act, as well as a number of technical complaints on its administrative aspects. In addition, the public was apathetic about the bill.

Because of this lack of enthusiasm, in late 1934 the Federal Bureau of Narcotics (FBN) shifted the emphasis from the need for uniform laws to deal effectively with local drug problems, to a public campaign on the menace of drugs, particularly marijuana. Few, if any, methodologically sound studies of the use and effects of marijuana existed, and the studies that did exist tended to show few harmful effects of the drug.[5] Nevertheless, marijuana was presented as producing insanity and increasing the propensity to commit crime. For example, an FBN statement submitted to the Congress in 1937 stated:

> Recently we have received many reports showing crimes of violence committed by persons while under the influence of marihuana...
>
> The deleterious, even vicious, qualities of the drug render it highly dangerous to the mind and body upon which it operates to destroy the will, cause one to lose the power of connected thought, producing imaginary delectable situations and gradually weakening the physical powers. Its use frequently leads to insanity.

> I have a statement here, giving an outline of cases reported to the Bureau or in the press, wherein the use of marihuana is connected with revolting crimes.[6]

In addition, the drug was presented as psychologically addictive, although it was not recognized as physically addictive in scientific and medical circles.

This campaign, which included a number of stories in the press of particularly gruesome crimes in which marijuana was said to have been implicated, seems to have been extremely successful. By early 1935 only 10 states had adopted the Uniform Drug Act; within the next year, 18 more adopted it with the marijuana inclusion, if they did not already have anti-marijuana legislation; and by 1937, 46 of the 48 states, as well as the District of Columbia, had enacted marijuana prohibition.

THE MID-20TH CENTURY: THE GROWTH OF FEDERAL INVOLVEMENT

There was still, however, no federal marijuana legislation. Proponents of marijuana control had hesitated to amend the 1914 Harrison Act to include cannabis because of the act's tenuous constitutionality. Consequently, a separate Marijuana Tax Act was introduced by the U. S. Treasury Department in 1937. It was passed by Congress without substantial debate.

After the Treasury Act was passed in 1937, public attention was diverted from marijuana-related activities, in part because the Federal Bureau of Narcotics attempted to limit the sensationalism of the issue.

It was not until the late 1940s that public concern was again directed at the marijuana issue because of an apparent increase in marijuana "addiction."[7] In particular, Congress was concerned by the allegation that marijuana use led to the use of harder drugs, such as heroin, and hence toward addiction. Congress was also disturbed by the 70-percent increase in arrests for narcotics violations between 1948 and 1950.

As a result, two new drug bills were passed by Congress. The first, the Boggs Act of 1951, provided for uniform and stricter penalties for both narcotics (under the Narcotic Drugs Import and Export

Act) and for marijuana (under the Marijuana Tax Act). Penalties under the Boggs Act were:

- first offense - 2-5 years;
- second offense - 5-10 years;
- third and subsequent offense - 10-20 years; and
- fine for all offenses - $2,000.

In addition, persons convicted of second or subsequent offenses were not eligible for probation, suspension, or parole.

The second bill was the Narcotic Control Drug Act of 1956, which passed after a 4-year period of Congressional reevaluation of the entire United States drug milieu. This act further increased the severity of penalties for possession and sale of drugs, and marijuana was included in the substances to which the act applied. The Narcotic Control Drug Act represents the apex of the strict penalty approach to the control of drug use in the United States.

THE SIXTIES: NEW PERCEPTIONS

After passage of the Boggs Act and the Narcotic Control Drug Act in the 1950s, there was little new response to marijuana, until the next decade. The 1960s, however, were characterized by a new sociological phenomenon--drug use involved larger segments of the middle class. College and even high school students began to use marijuana. In 1944 the LaGuardia Commission study concluded that in New York "...marijuana distribution and usage is found mainly in Harlem, the population of which is predominantly Negro and Latin American..."[8] By May 1969 Gallup polls indicated that 22 percent of college students had smoked marijuana, and by December 1970, 42 percent had done so.[9] National surveys in 1970 indicated that 10 million Americans had smoked marijuana, and some observers believed the figure to be closer to 20 million.[10] During this period, the arrest figures followed the rise in incidence. California arrests, for example, increased tenfold--from 5,155 in 1960 to 50,327 in 1968.[11] The increase in marijuana use was not, however, limited to the United States. In Canada the Royal Canadian Mounted Police reported a substantial increase in cannabis contacts: 20 in 1962, 2,300 in 1968, and 12,000 in 1972.[12] Adequate statistical information on the exact scope, structure, and timing of this social change is not available, although there is no question that such a movement did in fact occur.

The cause for the surge in marijuana use is less clear. Undoubtedly the political and social atmosphere of the 1960s--the youth rebellion against societal taboos, the alienation of youth from society, the spirit of civil disobedience--accounts for some of the change. The exposure to marijuana of soldiers in Vietnam is also a factor: a reported 50 to 60 percent of the soldiers stationed in Vietnam at least experimented with marijuana.[13] Certainly another reason, stressed by Canada's LeDain Commission in its findings,[14] was the fact that many found enjoyment in smoking marijuana.

The spread of drug use through U.S. society heightened both national awareness and national concern. Although a 1965 Act (the Drug Abuse Control Amendments) created misdemeanor penalties for illegal sale and manufacture of depressant and stimulant drugs and hallucinogens, the marijuana laws were not changed. As a result, pressure began to build for reduced marijuana penalties.

Nevertheless, enforcement of the marijuana laws intensified. In September 1969, the United States, with the concurrence of Mexico, initiated "Operation Intercept" to control marijuana importation. The effort included pursuit planes and patrol boats and an intensified search of all individuals who crossed the border. On the first day, traffic was backed up 2-1/2 miles at the border in at least one location. Tourists were irritated, business in border towns began to suffer, and complaints began to increase, including some from President Diaz of Mexico. Operation Intercept was cancelled only 3 weeks after it had begun.[15]

Also in 1969 the Supreme Court's Leary decision[16] struck down several provisions of the Marijuana Tax Act, highlighting the need for a general reform of the federal drug legislation.

The next year, Congress passed the Comprehensive Drug Abuse Prevention and Control Act, which:

- established a coherent regulatory framework for the manufacture and distribution of "controlled substances" for medical purposes, placing each substance in one of five schedules varying in degree of restriction;
- abolished minimum sentences for all drug offenses;

- made possession of all controlled substances for personal use or nonprofitable distribution a misdemeanor;
- provided discretionary probation with expungement of conviction if the probationary period was passed successfully; and
- distinguished marijuana from narcotics.

At the same time, a new Uniform Controlled Substance Act was approved by the National Conference of Commissioners. This act paralleled the 1970 federal legislation.

Also in 1970, Congress initiated two fact-finding programs in an effort to remedy the persisting lack of sound, detailed scientific and sociological information. The Department of Health, Education and Welfare's National Institute of Mental Health was given the task of reporting annually on the health consequences of marijuana use. Second, a bipartisan National Commission on Marihuana and Drug Abuse was established to thoroughly investigate patterns, incidence, and effects of drug use and to make recommendations on the future of U. S. marijuana law.

Although these two programs were established to begin the task of building a rational basis for future marijuana decisions, emotions continued to be high and opinions to be strong. Former President Nixon, for example, forcefully stated his opposition to legalization regardless of the findings of the Commission.

The medical and scientific issues associated with marijuana are presented in detail in Chapter III of this Volume. However, the National Commission, and the Marijuana and Health reports of the Department of Health, Education and Welfare indicated that marijuana effects, though not negligible, are more subtle and less spectacular than were frequently reported.

The two studies by the National Commission (1972 and 1973) indicated that marijuana use in the United States was indeed widespread: approximately 16 percent of adults and 14 percent of youths had used marijuana by 1972.[17] Such use included all sectors of society; in fact, the first report concluded that:

> The most notable statement that can be made about the vast majority of marihuana users--experimenters

> and intermittent users--is that they are essentially indistinguishable from their non-marihuana using peers by any fundamental criterion other than their marihuana use.[18]

Among other findings, the Commission found that:

- although marijuana is a potentially hazardous drug, its use at current levels does not pose a major threat to public health;
- heavy criminal penalties for possession of marijuana are functionally and philosophically inappropriate and are constitutionally suspect;
- there is not direct causal relationship between marijuana and crime; and
- the use of marijuana neither inevitably nor necessarily leads to the use of harder drugs.

The National Commission recommended that (1) private possession, public possession of less than an ounce, and distribution for no or insignificant remuneration no longer be an offense; (2) public use and public possession of more than an ounce be a criminal offense punishable by fine; and (3) cultivation, sale, or distribution for profit and possession with intent to sell remain felonies.

The findings and conclusions of the Commission were widely accepted. A number of national organizations recommended the same or similar approaches, including the governing board of the American Medical Association, the American Bar Association, numerous state and local bar associations, the National Education Association, Consumers Union, the American Public Health Association, and the National Council of Churches. In addition, the National Conference of Commissioners on Uniform State Laws, which had been instrumental in initiating previous state marijuana law changes, incorporated the National Commission's changes into its Uniform Control Substance Act.

However, the conclusions of the Commission were not universally accepted. For example, Senator James Eastland, in the introduction to the Hearings of the Senate Judiciary Committee on the "marijuana-hashish epidemic" stated:

> The spread of the epidemic has been facilitated by the widespread impression that marijuana is a relatively innocuous drug. ... It was because of this pervasive imbalance in dealing with the question of marijuana that so many intelligent people have been under the impression that the scientific community regards marijuana as one of the most innocuous of all drugs. Part of the purpose of our recent hearings was to correct this imbalance--to present the "other side" of the story--to establish the essential fact that a large number of highly reputable scientists today regard marijuana as an exceedingly dangerous drug.[19]

The Commission and the National Institute of Mental Health did succeed in one part of their objective: to provide a solid information base on which to build further research and activity. Indeed, it is on this base that current efforts in the marijuana field are proceeding.

THE CURRENT AGENDA

In November 1976, the Federal Strategy for Drug Abuse and Drug Traffic Prevention[20] was distributed which advocated a policy of discouraging the use of marijuana but adoption of a more "rational" (and, implicitly, less stringent) penalty structure. By 1976, eight states (Alaska, California, Colorado, Maine, Minnesota, Ohio, Oregon, and South Dakota) had passed legislation significantly lessening penalties for marijuana use. Preliminary evaluations of the impact of these major changes suggest that significant benefits may be derived, particularly in terms of economic savings in the criminal justice system.

Looking to the future, President Carter has publicly advocated a reduction in the penalties for personal use and has suggested that individual states, rather than the Federal Government, are the appropriate jurisdictions to consider change.

FOOTNOTES

[1] The material in this chapter is derived primarily from R. J. Bonnie and C. H. Whitebread II, The Marijuana Conviction, A History of Marijuana Prohibition the United States, The University Press of Virginia, Charlottesville, 1974.

[2] "Marijuana in Colonial America," The Leaflet, Vol. 5, Issue 2, May-August 1976.

[3] Brecher et al., Licit and Illicit Drugs, Boston, Little, Brown, 1972, p. 404.

[4] Bonnie and Whitebread, op. cit., p. 16.

[5] The two most important of these were the Indian Hemp Drugs Commission Report (1894), an exhaustive 3,281 page report on all aspects of marijuana and its use in India; and the Panama Canal Zone military investigation (1916-1929).

[6] Hearings on H. R. 6385, p. 30, quoted in Bonnie and Whitebread, ibid. p. 155.

[7] Mayor's Committee on Marijuana, The Marijuana Problem in the City of New York, Jacques Cattell Press; Lancaster, Pennsylvania, 1944.

[8] Ibid.

[9] Quoted in Brecher et al., Licit and Illicit Drugs, 1972, p. 423.

[10] Ibid, p. 423.

[11] Ibid, p. 422.

[12] Quoted in Green, Melvyn, and Miller, R. D., "Cannabis Use in Canada," in Rubin, Vera, Cannabis and Culture, Mouton, Paris, 1975.

[13] Armed Services Special Subcommittee, U. S. House of Representatives, quoted in Cannabis, A Report of the Commission of Inquiry into the Nonmedical Use of Drugs, Ottawa, 1972.

[14] Ibid.

[15] An account appears in Brecher et al., op cit., pp. 434-450.

FOOTNOTES (CONT.)

[16] Leary v. U.S., 395 U.S. 6, 89 S.C. 1532 (1969).

[17] Drugs in America, p. 63.

[18] Marijuana: A Signal of Misunderstanding, p. 41.

[19] Marihuana-Hashish Epidemic and its Impact on United States Security, Hearings Before the Senate Committee on the Judiciary, 1974, pp. XIV-XV.

[20] Strategy Council on Drug Abuse, Federal Strategy for Drug Abuse and Drug Traffic Prevention, U.S. Government Printing Office, November 1976.

II. THE CURRENT DIMENSION

The purpose of this chapter of the Research and Case Studies volume is to provide the reader with a summary of current data and trends in marijuana use and related criminal justice activities. The data were compiled from existing sources rather than as a result of surveys conducted expressly for this study.

GENERAL PATTERNS

Without question and by any measure marijuana use is extensive in the United States today. The latest data from the National Institute on Drug Abuse (NIDA) indicate that more than one in every five adults (21.3 percent) and a similar number of youths aged 12-17 (22.4 percent) have used marijuana at some time in their lives. In other words, approximately 37 million individuals in the United States have used marijuana.

The number of people who are currently using marijuana is smaller, although still substantial: 8 percent of adults and 12.3 percent of youths had used marijuana at least once in the month preceding the NIDA study.

Marijuana is the third most frequently used drug for nonmedical purposes (after cigarettes and alcohol), and it is the most frequently used illicit drug. Comparative figures for drug use are presented in Table II-1.

Marijuana Use and Age

Marijuana use is extremely age specific, with the highest use occurring among young adults between the ages of 18 and 25. Approximately 52.9 percent of this group have used marijuana at least once. Data on current users (i.e., within the last month) also show a high proportion of use among this age group (see Table II-2).

These data are corroborated by other sources. For example, the results of a national study by Johnston, et al. of usage patterns among high school seniors are summarized below in Table II-3. Similarly, Blackford has been conducting an annual study of drug use in San Mateo County, California, since 1968. The level of marijuana use in San Mateo, a relatively well-to-do suburb of San Francisco, is only slightly higher (as expected) than that found in the other studies (see Table II-4).

TABLE II-1

USE OF DRUGS

TYPE OF DRUG	PERCENTAGE OF YOUTH (12-17)		PERCENTAGE OF ADULTS (18+)	
	Ever Used	Current User*	Ever Used	Current User*
Alcohol	NA	32.4	NA	58.8
Cigarettes	NA	23.4	NA	40.7
Marijuana	22.4	12.3	21.3	8.0
Hashish	9.6	2.8	9.4	1.4
Glue, Other Inhalants	8.1	0.9	3.4	**
LSD, Other Hallucinogens	5.1	0.9	4.9	**
Cocaine	3.4	1.0	4.1	0.7
Heroin	0.5	**	1.2	**
Methodone	0.6	**	0.8	**
Other Opiates	6.3	2.3	5.3	0.5
Psychotherapeutic Drugs (Nonmedical Use)	10.5	2.0	15.0	3.2

***Used at least once within last month.**
****Less than 0.5 percent.**

SOURCE: ***Nonmedical Use of Psychoactive Substances,*** **National Institute on Drug Abuse, Washington, D.C., 1976.**

TABLE II-2

CURRENT USE BY AGE

AGE	CURRENT USERS* (Percentage of Total Age Group)
12-13	3
14-15	13
16-17	21
18-21	25
22-25	25
26-34	11
35+	1

***Within last month.**

SOURCE: NIDA, *Nonmedical Use of Psychoactive Substances,* Washington, D.C., 1976.

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TABLE II-3

MARIJUANA USE AMONG HIGH SCHOOL SENIORS (1976)

FREQUENCY	LIFETIME	LAST 12 MONTHS	LAST 30 DAYS
Any Use	52.9%	44.7%	27.3%
1-2 Times	9.1	9.0	8.5
3-19 Times	15.3	16.5	15.6
20+ Times	28.5	19.2	8.1

SOURCE: Johnston et al., "Monitoring the Future: A Continuing of the Lifestyles and Values of Youth," Institute for Social Research, University of Michigan, 1976.

TABLE II-4

MARIJUANA USE IN SAN MATEO, CALIFORNIA (1976)

LEVEL OF USE DURING PAST YEAR	PERCENTAGE OF POPULATION
Any Use	55.3
10 or More Occasions	35.4
50 or More Occasions	22.5

SOURCE: Summary Report, Surveys of Student Drug Use, San Mateo County, California, 1976.

National User Characteristics

Because marijuana use in the United States is so widespread, it is clearly no longer confined to a single or limited number of groups or subcultural entities. Therefore, the characteristics of a typical user are difficult to describe. For example, statistically the "model" user is a college-educated, nonwhite, male who is an urban resident in the west. These data are represented more fully in Tables II-5 and

TABLE II-5

MARIJUANA EXPERIENCE AMONG SUBGROUPS OF YOUTH: TRENDS IN PREVALENCE (EVER USED) AND USE IN PAST MONTH, 1974-1975/6

CHARACTERISTIC	Ever Used		Used in Past Month	
	1974	1975/6	1974	1975/6
All Youth (age 12-17)	23%	22%	12%	12%
Age:				
12-13	6	6	2	3
14-15	22	21	12	13
16-17	39	40	20	21
Sex:				
Male	24	26	12	14
Female	21	19	11	11
Race:				
White	24	22	12	12
Nonwhite	17	22	9	11
Region:				
Northeast	26	21	14	13
North Central	21	26	11	16
South	17	16	6	7
West	30	30	19	17
Population Density:				
Large Metropolitan	27	25	14	18
Other Metropolitan	22	24	11	11
Nonmetropolitan	18	18	10	8

SOURCE: National Institute on Drug Abuse, *Nonmedical Use of Psychoactive Substances*, Washington, D.C., 1976.

TABLE II-6

MARIJUANA EXPERIENCE AMONG SUBGROUPS OF ADULTS: TRENDS IN PREVALENCE (EVER USED) AND USE IN PAST MONTH, 1974-1975/6

CHARACTERISTIC	Ever Used		Used in Past Month	
	1974	1975/6	1974	1975/6
All Adults (age 18+)	19%	21%	7%	8%
Age:				
18-25	53	53	25	25
26-34	29	36	8	11
35+	4	6	*	1
Sex:				
Male	24	29	9	11
Female	14	14	5	5
Race:				
White	18	21	7	8
Nonwhite	26	25	8	10
Education:				
Not High School Graduate	9	12	3	4
High School Graduate	20	22	7	8
College	27	30	10	12
Not a Graduate	31	30	14	14
Graduate	23	30	6	10
Region:				
Northeast	22	24	7	9
North Central	17	19	7	7
South	13	17	4	6
West	29	28	11	11
Population Density:				
Large Metropolitan	24	26	9	9
Other Metropolitan	19	23	8	9
Nonmetropolitan	12	13	3	4

***Less than 0.5 percent.**

SOURCE: National Institute on Drug Abuse, *Nonmedical Use of Psychoactive Substances*, Washington, D.C., 1976.

II-6. A substantial number of studies have attempted to define in greater detail the nature of the user, and in particular the factors that cause the initiation or continuation of use. Peer group pressure is without question an important factor in the decision to use marijuana,[1] although it does not explain the initial rise in the peer group consensus. Marijuana is clearly a social drug, as a 1975 study by Yankelovich, Skelly and White indicates (see Table II-7).

TABLE II-7

SETTINGS IN WHICH DRUGS ARE OFTEN USED

SETTING	High School Drug Users	College Drug Users	Treatment Sample
With One or Two Friends	80%	84%	91%
At a Party with Friends	73	71	62
At a Dance or Concert	50	37	56
At School	27	17	49
At a Party with Strangers	28	28	29
Alone	19	26	42

NOTE: The treatment sample is not part of the cross-section sample but is based on 98 respondents of high school and college age from 20 treatment centers at the time of the interviewing.

SOURCE: Drug Abuse Council, Survey of Marijuana Use and Attitudes: State of Oregon, December 1, 1975, press release.

In spite of the extent of current use and the social nature of the drug, a degree of nonconformity with social mores remains among the marijuana using group, although this is less true than in the 1960s. For example, in a study of males aged 20-30, O'Donnell, et al. found the relationship between current use and living patterns presented in Table II-8. However, a similar relationship was found between usage patterns and alcohol and cigarette consumption.

TABLE II-8

USER LIVING PATTERNS

LIVING PATTERN	% OF CURRENT USERS
Married	25
Living with Parents	38
Living Independently	56
Consensual Union	68

SOURCE: O'Donnell et al., *Non-Medical Drug Use Among Young User within U.S.*, Special Action Office for Drug Abuse Prevention and NIDA, 1975.

As the marijuana user adopts a more traditional life style involving marriage and employment, usage tends to diminish:

> Even among those people who have used marijuana, as opposed to simple experimenting with it a few times, there is a noticeable fall off phenomenon which seems to accompany maturation and changing life styles. The single most significant factor related to the cessation of marijuana use by former college users has been found to be the development of a commitment to nonstudent roles, including family and job responsibilities. These changes also reflect an increasing social isolation from other marijuana users. Age alone is not a significant factor in this regard.[2]

This pattern is corroborated by the current use data which were presented in Table II-2. However, it is unclear whether this pattern will change significantly as the cohort of current users in the youth and young adult categories progresses to the older adult category.

Marijuana, Criminal Behavior, and Hard Drugs

During the last half century, a strong causal relationship between marijuana use and both criminal activity and the use of harder drugs, such as heroin, has often been imputed. This relationship has been almost completely discredited by current analysts. With regard to criminal behavior, the National Commission on Drug Abuse stated:

> One can conclude that marijuana use is not ordinarily accompanied by or productive of aggressive behavior, thus contradicting the theory that it induces acts of violence. Indeed, the only crimes which can be attributed directly to marijuana using behavior are those resulting from use, possession, or transfer of an illegal substance.[3]

These conclusions were reached in spite of the fact that a number of studies indicated that self-reported criminal acts and contacts with the criminal justice system are higher for marijuana users than for nonusers.[4] This relationship is presumed by most analysts to be noncausal and dependent on other factors that determine a propensity for both marijuana use (a type of criminal behavior) and other types of criminal behavior. An interesting hypothesis is that the general disrespect for law generated by current criminal marijuana possession penalties tends to reduce other types of criminal or antisocial behavior. To our knowledge this hypothesis has not been tested. Regardless of these considerations, the vast majority of marijuana users do not appear to engage in any other criminal activity.[5]

Similarly, with respect to the relationship between marijuana and harder drugs, most researchers have eschewed causality, despite a clear progression by heroin users from cigarettes and alcohol to heroin use. This progression of drug use is often:[6]

$$\left.\begin{array}{l}\text{beer, wine}\\ \text{cigarettes}\\ \text{hard liquor}\end{array}\right\}\ \text{entry drugs}$$

marijuana
pills
psychedelics
cocaine
heroin

Only 2 to 3 percent of adolescents using entry drugs progress to the use of harder drugs without first using marijuana. However, although many heroin users have used marijuana, most marijuana users do not progress to heroin. As shown in Table II-1, 12.3 percent of youths and 8 percent of adults currently use marijuana, however, only a small number (less than 0.5 percent) in each category currently use heroin.

A caveat in all of these studies is well-expressed in Marijuana and Health:

> It should be stressed that in general, studies relating marijuana use to other variables have not established more than a statistical relationship. It is clear that marijuana usage is frequently part of a larger pattern of non-conformity, but the existence of causal relationships between marijuana use and other behavior have generally not been determined.[7]

USAGE TRENDS

The trends of marijuana use are of primary concern to decision-makers, because such trends can help prepare for the future dimensions of marijuana use and are useful in assessing the success of previous marijuana policy. Without question, usage has increased tremendously over the last decade (see Table II-9), although sound national statistical data are not available prior to 1971.

TABLE II-9

TRENDS IN USE

YEAR	ALL YOUTH (12-17)		ALL ADULTS (18+)	
	Ever Used	Used Past Month	Ever Used	Used Past Month
1971	14%	6%	15%	5%
1972	14	7	16	8
1974	23	12	19	7
1975/6	22	12	21	8

SOURCE: NIDA, *Nonmedical Use of Psychoactive Substances,* Washington, D.C., 1976, p. 35.

Several important considerations arise from Table II-9:

- The number of adults who have ever used marijuana has increased steadily since 1971 and shows no sign of decrease. However, since this category reflects the entry into adulthood of succeeding cohorts of youthful users, it is not completely useful as a measure of overall trends. It should continue to rise even after a peak usage period has been reached. More relevant categories are those of youthful ever-users and youthful and adult current users.

- The definition of "used in past month" was changed between the 1971-1972 studies and the 1974-75/76 studies. The previous definition was "used more than once a month." For the later studies, the definition was changed to "used at least once in the last month." Since the second definition tends to include more users than the former, the overall increase in usage has probably been exaggerated.

- The number of adults who have used marijuana in the last month has remained relatively constant since 1972.

- Both the number of youthful ever-users and current users have remained fairly constant in the last two studies (1974 and 1975/76).

These considerations prompt a preliminary conclusion that the amount of marijuana use in the United States may be reaching a peak. A more detailed breakdown of ever-users by age supports this preliminary conclusion as shown in Table II-10.

TABLE II-10

TRENDS IN PREVALENCE (EVER-USED)

AGE	% OF USERS BY YEAR			
	1971	1972	1974	1975/6
12-13	6	4	6	6
14-15	10	10	22	21
16-17	27	29	39	40
18-21	40	55	56	52
22-25	38	40	49	53
26-34	19	20	29	36
35+	7	3	4	6

SOURCE: NIDA, *Nonmedical Use of Psychoactive Substances*, Washington, D.C., 1976.

As indicated in Table II-10, the number of individuals in the youthful groups who have used marijuana at least once has not changed significantly in the last two studies, and those in the age group 18-21 declined in number. The increase has occurred in the over-21 age categories, which is consistent with the comments above.

The implications of a detailed breakdown of past month usage by age (Table II-11) are less clear.

TABLE II-11

TRENDS: USE IN PAST MONTH

AGE	% OF USERS BY YEAR			
	1971	1972	1974	1975/6
12-13	2	1	2	3
14-15	7	6	12	13
16-17	10	16	20	21
18-21	18	34	30	25
22-25	16	21	20	25
26-34	5	9	8	11
35+	*	*	*	1

***Less than 0.5 percent.**

SOURCE: NIDA, *Nonmedical Use of Psychoactive Substances*, Washington, D.C., 1976.

Use in the past month has increased between 1974 and 1975/76 in all but one age group (18-21). However, the increase in all age groups under 18 is not significant (1 percent), and the decrease in the 18-21 age group is significant. Again, a substantial increase occurred, only in the older groups (22-34), which may be explained by the advancing age of those who were previously in younger categories. These increases in use in the past month in the older categories may therefore represent the residual effects of an impulse toward increased use felt in prior years. In any case, the lack of significant increase in the younger categories is encouraging.

Unfortunately, the results of the Johnston survey on drug use among high school seniors are not as encouraging (see Table II-12).

TABLE II-12

MARIJUANA USE AMONG HIGH SCHOOL SENIORS
(1975-1976)

FREQUENCY	Lifetime		Last 12 Months		Last 30 Days	
	1975	1976	1975	1976	1975	1976
Any Use	47.5%	52.9%	40.1%	44.7%	27.3%	32.2%
1- 2 Times	8.8	9.1	8.7	9.0	7.7	8.5
3-19 Times	14.5	15.3	15.0	16.5	13.5	15.6
20+ Times	24.2	28.5	16.2	19.2	6.1	8.1

SOURCE: Johnston et al., "Monitoring the Future: A Continuing Study of the Lifestyles and Values of Youth, "Institute for Social Research, University of Michigan, 1976.

These data show a significant increase in use in most categories and imply that use is increasing at least among high school seniors, which appears to be inconsistent with the NIDA data for a similar age group reported earlier. However, this study covers only two years and therefore does not provide the perspective of a long-term study.

The San Mateo study, cited earlier, is also relevant. Although only a one-county study and therefore not representative of national trends, it is of interest for four reasons:

- The study is a statistically rigorous study.
- The study has been consistently repeated annually since 1968.
- California passed a marijuana decriminalization law which became effective in January 1976, before the last survey. Although it is too early to make definitive judgments about the impact of the law, the data provide a preliminary assessment of the impact.
- The study is useful for comparison with the national data.

As can be seen in Table II-13, usage has not increased in any category over the past 3 years, in spite of the marijuana decriminalization law.

TABLE II-13

SAN MATEO STUDENT MARIJUANA USE

YEAR	FREQUENCY WITHIN PAST YEAR		
	Any Use	10 or More	50 or More
1968	31.9	17.5	N/A
1969	39.5	24.4	N/A
1970	42.5	26.7	15.9
1971	49.7	32.8	21.1
1972	51.0	34.5	21.7
1973	54.8	36.8	23.4
1974	55.5	37.7	24.5
1975	55.0	36.3	22.6
1976	55.3	35.4	22.5

SOURCE: Summary Report, Surveys of Student Drug Use,
San Mateo County, California, 1976.

These figures appear to be more consistent with the NIDA data than the Johnston data.

In conclusion, the data are not sufficiently consistent to be able to state whether marijuana usage in the United States has reached a peak. At a minimum, however, it appears that increases in use are slowing.

THE MARIJUANA USER AND THE LAW

Arrests

Arrests for marijuana use have increased substantially (more than 2,000 percent) over the last 10 years as indicated in Table II-14.

Comparing the increase in arrests with the increase in marijuana use over the 1971-74 period, arrests clearly increased significantly

TABLE II-14

MARIJUANA ARRESTS

Year	No. of Marijuana Arrests	% of Drug Arrests	% Change in Arrests	% Change in Current Use	
				Youth	Adults
1965	18,815	40.8%			
1966	31,119	51.5			
1967	61,843	61.2			
1968	95,810	59.1			
1969	118,903	51.1			
1970	188,682	45.4			
1971	225,828	45.9	29	1	3
1972	292,179	55.4			
1973	420,700	66.9	53	5	– 1
1974	445,600	69.4	– 7	0.3	1
1975	416,100	69.2			

Source: The data on drug arrests are from the Federal Bureau of Investigation's Uniform Crime Reports, 1976. The data on increases in current use are from the National Institute on Drug Abuse, "Nonmedical Use of Psychoactive Substances" and are provided for comparison with the increase in arrests. There was no NIDA study in 1973.

faster than use. However, the increase in arrests may have resulted from intensified law enforcement activity, the characteristics of user behavior (increased use in public), or both. The first year in which marijuana arrests declined was 1975.

The Laws as a Deterrent

Of particular interest to decision-makers in the marijuana area is the question of whether criminal sanctions, including incarceration, deter the use of marijuana. An economic model for marijuana would certainly include the risk of criminal penalties as a cost to be included in the calculation of the rational individual. Since decriminalization or legalization would reduce the risk, the cost would also be reduced and therefore more marijuana would presumably be consumed.[8] Of course the model is substantially more complicated, since numerous human factors are involved, including ignorance of the law and youthful enthusiasm for disobedience of the law.

In the late 1960s and early 1970s, many states revised their penalties for marijuana possession downward from felonies to misdemeanors. However, the possibility of substantial jail sentences remained. Both usage and arrests increased in subsequent years until arrests began to decline in 1975. It is impossible to determine whether the laws or the arrest patterns affected use, since we do not know how usage would have changed under a different set of laws or arrest patterns. To analyze the deterrent effect of the law, two alternate approaches must be utilized:

- determine whether use changed in the eight states that decriminalized marijuana use; and
- ask the public about their attitudes toward criminal penalties as a deterrent.

In the current study, some information on patterns of behavior was collected and is reported in Chapter V, "Case Studies." This information is largely subjective opinion on the part of criminal justice system officials and others with contact with marijuana users. Essentially, no large increase in use has been observed in the states that have passed decriminalization laws visited during this study.

To our knowledge, only two statistical surveys have been undertaken in areas that have decriminalization laws. One is the San Mateo study, which indicated no change in usage patterns since 1974, in spite of the passage of a decriminalization bill effective

January 1976. The other is a three-year survey by the Drug Abuse Council in Oregon, where a decriminalization law became effective in October 1973. The conclusions of the first year's survey, in October 1974, were:

> It appears that the number of individuals using marijuana has not significantly increased in Oregon during the year since it has removed criminal penalties for simple possession of one ounce or less. Nineteen percent of Oregon adults report that they have used marijuana at least once; 9 percent of total adults say that they currently use marijuana. Of those currently using marijuana, only 6 percent report that they have used it for less than one year, 91 percent for more than one year. All of the less-than-one-year users are between 19 and 29 years of age. Of those individuals currently using marijuana, a large number report a decrease in usage during the last year, while only a small number report an increase:

	Current Users (percentage)
Decreased usage	40
Increased usage	5
No change	52

The second year's survey had similar results as shown in Tables II-15 and II-16.

TABLE II-15

MARIJUANA USAGE IN OREGON

TIME	% OF ADULTS WHO HAVE EVER USED	% OF ADULTS WHO CURRENTLY USE
October 1974	19	9
October 1975	20	8

SOURCE: Drug Abuse Council, Survey of Marijuana Use and Attitudes: State of Oregon, December 1, 1975 – Press Release.

TABLE II-16

CHANGE IN MARIJUANA USAGE IN OREGON

CHANGE IN USE	% OF CURRENT USERS
Decreased	35
Increased	9
No Change	54

SOURCE: Drug Abuse Council, Survey of Marijuana Use and Attitudes: State of Oregon, December 1, 1975 – Press Release.

Among current users, 12 percent began use after the change in law; 87 percent were using it prior to the change.

An independent study by an Oregon legislative research group came to a similar conclusion:[9]

> The laws do not appear to have precipitated any of the major negative effects which those who object to the decriminalization trend had predicted would happen if a state reduced its criminal penalties for those possessing or using marijuana. One district attorney from an eastern Oregon county observed:
>
> > If that was the most serious mistake the 1973 legislature made, we'd be in good shape.
>
> This comment appears to express the general attitude of those in Oregon who enforce and administer the decriminalization of marijuana laws.

However, the recently released (January 28, 1977) third annual study of usage patterns in Oregon of the Drug Abuse Council indicates a change in this pattern. The percentage of Oregon adults who have ever used marijuana increased from 20 percent to 24 percent in 1976; the percentage of those who currently use the drug increased from 8 percent to 12 percent. It is difficult to explain this sudden increase in use coming as it does three years after the passage of Oregon's decriminalization legislation. The fact that the Oregon law was highly publicized, and that only a small proportion of nonusers gave the possibility of legal prosecution as a reason for nonuse in 1974, 1975, and 1976, suggests that a simple reduction in fear of incarceration was not the reason for the increase in use. Instead, changing attitudes toward the drug, which were symbolized and reinforced by the change in the law, probably account for the accelerated increase in use. In this connection, one very striking set of statistics in the 1976 Oregon data is that the possibility of health dangers perceived as a reason for not smoking marijuana has decreased significantly. The number of nonsmokers who gave this as a reason for not smoking increased from 23 percent to 28 percent between 1974 and 1975, but then dropped sharply and significantly to 7 percent in 1976. Possibly the numerous studies by the National Institute on Drug Abuse and others (discussed in detail in Chapter III) have caused a substantial change in perception as to the medical consequences of marijuana use, and this perceptual change has led to an increase in use.

It is important to understand the relationship of use in Oregon with the pattern of use in other Western states. As reported in Table II-6, the average level of adult ever-users in the Western United States was 29 percent in 1974 and 28 percent in 1975/76. These levels are higher than that currently reported in Oregon (24 percent). Similarly, the percentage of current users in the Western United States was 11 percent in both 1974 and 1975/76, about the same as the 12 percent reported in the 1976 Oregon survey. Consequently, Oregon may have gone through a "catching-up" phase in 1976. Whether use will continue to increase remains to be seen in future Oregon studies.

A number of surveys have also been undertaken regarding public perceptions of deterrents of using marijuana. These surveys usually take the form of asking nonusing respondents why they do not use marijuana. The results of the National Commission's survey are shown in Table II-17.

TABLE II-17

REASONS GIVEN BY NONSMOKERS FOR NOT TRYING MARIJUANA

REASON	% OF FIRST-PLACE VOTES
Not Interested	81.0
Fear of Physical and Mental Effects	13.3
Fear of Legal Reprisals	10.6
Too Difficult to Obtain	2.1
Too Expensive	0.0

SOURCE: National Commission on Marihuana and Drug Abuse, *Drug Use in America: Problem in Perspective*, 1973.

In a national study by the Drug Abuse Council (DAC), "fear of getting caught" ranked 14th among reasons given by those who had never used marijuana, although 24 percent did give this as a reason.[10] In an earlier study by Johnston,[11] "concerned about getting arrested" ranked third behind "it's against my beliefs" and "concerned about possible psychological damage." Fear of arrest was cited by 51.5 percent as a reason for not using marijuana.

Based on these data, it is clear that apprehension about the criminal penalty consequences of marijuana use is a factor which individuals consider in deciding not to use marijuana, although generally it is not the major consideration. Thus, although this apprehension may act as a deterrent in some cases, changing the law may not increase use since the other reasons which nonusers cite for not using marijuana would remain.

An alternative approach is to ask nonusers whether they would use marijuana if decriminalization did occur. This question was included in the Johnston survey, and 75 percent said they would use it with the same frequency, less often, or not at all if marijuana were legalized. Only 6 percent said they would try it, and 9 percent said that they would use it more than they do now.

The National Commission also asked this question, and the results for nonusers are presented in Table II-18.

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TABLE II-18

EFFECTS OF LEGALIZATION: PERCENTAGE OF NONUSERS WHO WOULD TRY MARIJUANA

RESPONDENT	1972	1973
Adults	4	3
Youth	12	8

SOURCE: *Drug Use in America*, March 1973, p. 64, and
Marihuana, a Signal of Misunderstanding,
March 1972, Vol. II, p. 957.

According to the National Commission, among current users, only about 8 percent of the adults in 1973 (10 percent in 1972) felt that they would use it at least as often as they currently did. The Commission concluded:

> In sum, the prospect of readily available marihuana elicits no substantial expectation of initiated or increased consumption.

There is, however, an important caveat. In response to questions as to why they do not smoke marijuana, respondents often state that "it is against their beliefs" or that they are simply not "interested." These attitudes may change as a result of widespread decriminalization. Consequently usage may increase, not only because the fear of incarceration is removed, but also because the inhibitions of past belief and attitudes may be reduced by a change in the legal status of the drug. This may be occurring at the present time in Oregon. Therefore, it is difficult to state with any certainty whether use can be expected to increase with decriminalization.

Conclusions

Sufficient time has not elapsed since the passage of various reduced penalty statutes to permit a long-term analysis of impact on use. Nevertheless, short-term use does not appear to increase substantially as a result of decriminalization. Public surveys also show that fear of criminal penalties is only one of many reasons why nonusers abstain from marijuana. Only a small percentage indicate that they would begin to use marijuana if it were decriminalized or legalized. These results cannot be generalized with certainty, however; it may be that widespread changes in marijuana laws will cause substantial public attitude changes resulting in an increased incidence of use.

PUBLIC ATTITUDES AND BELIEFS

Some of the attitudes and beliefs of the public concerning marijuana are discussed below.

Public Support for Decriminalization/Legalization

Of primary concern to many decision-makers is, of course, whether the public supports the concept of decriminalization or legalization. In a survey by the National Commission, a majority of respondents favored no jail sentence for first offense conviction of possession (see Table II-19).

TABLE II-19

ADULT VIEWS ON MARIJUANA PENALITES

TYPE OF PENALTY FOR POSSESSION OR USE	DEFENDANT IS ADULT			
	First Offense		Second Offense	
No Penalty	13%	(64%)	7%	(24%)
Fine	28%		6%	
Probation	23%		11%	
Jail Sentence				
Up to a Week	11%	(32%)	14%	(70%)
Up to a Year	12%		24%	
More than a Year	9%		32%	
No Opinion	4%		6%	

SOURCE: National Commission on Marihuana and Drug Abuse, *Marihuana, A Signal of Misunderstanding,* Appendix, Vol. II, pp. 916-917.

More recent surveys by NIDA show similar results, with a slowly increasing preference for penalty reduction (see Table II-20).

TABLE II-20

CHANGE IN ADULT ATTITUDES TOWARD MARIJUANA OFFENSES

TYPE OF PENALTY FOR POSSESSION OR USE	First Offense		Second Offense	
	1974	1975/6	1974	1975/6
Penalty	16%	17.8%	10%	10.3%
Fine	15	16.3	15	17.9
Probation	21	20.9	16	16.1
Require Treatment	34	31.3	20	20.1
Jail Sentence				
Up to a Year	6	5.2	20	20.1
More than a Year	4	4.7	15	11.5
No Opinion, No Answer	4	3.8	4	4.1

SOURCE: NIDA, *Nonmedical Use of Psychoactive Substances,* 1975/76, p. 114.

Table II-20 indicates that only a minority prefer jail sentences even for a second conviction. However, a majority of respondents continue to favor jail sentences for sale; in the 1975-76 study, for example, 63.9 percent held this opinion for a first offense and 77.1 percent for a second offense.

A 1974 survey by the Drug Abuse Council showed a somewhat tougher public stance (see Table II-21).

TABLE II-21

ADULT ATTITUDES TOWARD MARIJUANA LAWS

ATTITUDE TOWARD LAW	% OF RESPONDENTS
Law Remain As Is	13%
Possession of Small Amounts	
. Civil Fine	10
. Legal	13 (39%)
Sale and Possession of Small Amounts Legal	16
Tougher Penalties	40

SOURCE: Drug Abuse Council, National Survey of Marijuana Use and Attitudes, 1974.

However, more recent surveys of high school seniors by Johnston[12] indicate that a majority believe that marijuana should be either legal or punishable as a civil infraction (see Table II-22).

TABLE II-22

ATTITUDES REGARDING THE LEGAL STATUS OF MARIJUANA

	1975	**1976**
Q. There has been a great deal of public debate about whether marijuana use should be legal. Which of the following policies would you favor?		
Using Marijuana Should Be Entirely Legal	27.4%	32.6%
It Should Be a Minor Violation – Like a Parking Ticket – but not a Crime	25.5	29.1
It Should Be a Crime	30.2	25.4
Don't Know	16.9	13.0
Q. If it were legal for people to USE marijuana, should it also be legal to SELL marijuana?		
No	27.7%	23.0%
Yes, but Only to Adults	37.1	49.9
Yes, to Anyone	16.1	13.3
Don't Know	19.1	13.9

SOURCE: Johnston, Lloyd, et al., "Monitoring the Future," Statement to Press, November 23, 1976.

The proportion of the population which opposes decriminalization or lessening of penalties is decreasing over time. The absolute size of this proportion is less clear. National polls indicate that supporters of incarceration for simple possession are in the minority,[13] particularly among younger age groups.[14] However, some surveys from individual states (e.g., New Jersey, Iowa, and Louisiana, as reported in Chapter V) indicate that in these states decriminalization is opposed by the majority.

An important related question concerns the depth of feeling on the decriminalization issue. That is, do those individuals who support or oppose decriminalization do so strongly, or are they basically indifferent? This question is difficult to answer. Some studies (such as the annual research effort undertaken by NIDA) attempt to assign values to the attitudes of respondents along a scale of 0 (most positive) to 5 (most negative). However, the particular methodology involved does not lend itself to providing a response to the specific question under consideration here. Perhaps the only indication of the depth of public feeling on the issue is the fact that in interviews with state and local government officials in nine states undertaken as part of this study, none of the officials interviewed perceived marijuana to be a pivotal political issue. Decriminalization supporters in most of the states visited felt that they had not suffered politically as a result of their position, even though some had been apprehensive about the marijuana issue and in some cases (such as that of the Louisiana Attorney General) the supporter's marijuana position had been frequently raised by an opponent. Those who opposed decriminalization felt that they were supported by the public on the issue but did not perceive it as an important factor in their campaign. These findings are discussed in greater detail in Chapter IV of Volume 2, "Case Study Findings."

Other Public Attitudes and Beliefs

The public maintains a number of beliefs and attitudes concerning marijuana, many of which are no longer considered valid by most experts in the field. For example, in the 1973 report of the National Commission a majority of adults (58 percent) and youth (65 percent) were found to believe that "marijuana users commit crimes not otherwise committed." However, a wide disparity of opinion existed between those who had used and those who had not used marijuana (see Table II-23).

TABLE II-23
BELIEFS ABOUT MARIJUANA

Positive Response to Statement: *Marijuana users commit crimes not otherwise committed.*

RESPONDENT	With Marijuana Experience	Without Marijuana Experience
Adults	15%	66%
Youth	24%	72%

SOURCE: National Commission on Marihuana and Drug Abuse, *Drug Use in America: Problem in Perspective*, 1973, p. 155.

Unfortunately, it is not possible to determine whether public beliefs on the relationship between marijuana and crime have changed recently because there is no recent study on this issue. The public also perceives marijuana as addictive and leading to harder drugs (see Table II-24).

TABLE II-24

MARIJUANA BELIEFS

EFFECTS	% of All Youth (Age 12-17)			% of All Adults (Age 18+)		
	1972	1974	1975/6	1972	1974	1975/6
Positive						
You Can Try Marijuana Once or Twice With No Bad Effects	42	49	48.2	44	46	47.9
You Can Use Marijuana Without Ever Becoming Addicted to It	31	33	33.6	26	24	25.0
Negative						
Marijuana Makes People Want to Try Stronger Things Like Heroin	65	59	60.9	65	62	60.0

SOURCE: National Institute on Drug Abuse, *Nonmedical Use of Psychoactive Substances*, Washington, D.C., 1976, p. 104.

This perception does not seem to have substantially changed over time. As discussed earlier, these opinions conflict with expert opinion on the nature of marijuana use and its relationship to other drugs.

THE ECONOMICS OF MARIJUANA

According to at least one estimate,[15] approximately $4 billion is spent annually on marijuana by users, and at least 50 percent of that is profit to the seller. It is, of course, difficult to develop any precise estimate, since marijuana is illegal.

No comprehensive study on the societal costs of marijuana use for the United States has been undertaken. These costs would presumably include costs to the criminal justice system and health care system as well as any lost employment and similar social costs.

A recent report, entitled Costs to Society of Drug Abuse,[16] attempted to measure the costs of all drug abuse, although marijuana was not differentiated. The middle estimate of this total cost was

$10.3 billion, of which $6.4 billion, or 62 percent, was attributable to heroin. This $10.3 billion compares to an estimated cost to society of $32 billion for alcoholism and alcohol abuse.

Although estimates of the economic costs of marijuana control are not available on a national basis, estimates have been made in some states. These state estimates are discussed more fully in our case study analyses.

FOOTNOTES

[1] Marijuana and Health, 1975, p. 18.

[2] Dupont, Dr. Robert, Testimony before the Alchoholism and Narcotics Subcommittee, U.S. Senate, November 19, 1974.

[3] Drug Use in America, 1973, p. 159.

[4] Reported in Marijuana and Health, op. cit., p. 19.

[5] Ibid.

[6] Ibid, pp. 18-19.

[7] Ibid, p. 19.

[8] See, for example, Koch, J.V. and Grupp. S.E., "Police and Illicit Drug Markets: Some Economic Consideration," British Journal of Addiction, 1973, Volume 68, pp. 351-362.

[9] Effects of the Oregon Laws Decriminalization Possession and Use of Small Quantities of Marijuana, Legislator Research, Salem, Oregon, December 31, 1974, p. 62.

[10] Yankelovich et al., Students and Drugs, op. cit., p. 18.

[11] Johnston, Lloyd, Drugs and American Youth, University of Michigan, May 1975.

[12] Johnston, Lloyd, et al., "Monitoring the Future," Statement to Press, November 23, 1976.

[13] NIDA, Nonmedical Use of Psychoactive Substances, Washington, D.C., 1976.

[14] Johnston, Lloyd, "Monitoring the Future: A Continuing Study of the Lifestyles and Values of Youth," University of Michigan, 1976.

[15] Irving Goffman, PhD., former Chairman, Economics Department, University of Florida, Gainesville, Florida, remarks before the NORML Conference, December 12, 1976.

[16] NIDA, May 1976.

III. THE MEDICAL/HEALTH DIMENSION

This section documents the existing status of medical and scientific research into the potential effects of periodic or prolonged marijuana use. The technical aspects of this subject require substantial reliance on medical and scientific terminology. Rather than dilute the findings by using more common terminology, the section maintains the more complex language. To assist the state policymaker in obtaining an overview, a brief summary of the section is provided. We believe, however, that the more complete section will be of significant use when the issue is actively considered and debated within a state.

To permit the users of this section to expand their knowledge of the subject area, and because the intent of this section is to summarize a wide spectrum of prior and ongoing medical research, a bibliography of the various research studies is contained at the end of the section. References to specific studies are contained in the text.

SUMMARY

As previous sections indicated, current evidence points to a significant increase in marijuana use by Americans during the last two years: daily or near-daily usage has increased, the majority (53 percent) of the 18-25 age group have tried marijuana, and since 1972 there has been at least a 9-percent increase of those under 18 who have tried it (23 percent). Future trends of marijuana usage are still uncertain.

Marijuana (cannabis) is a complex mixture of variable amounts of numerous potentially active substances. The recent introduction of a refinement in the synthesis of delta-9-THC, the major psychoactive drug in marijuana, has been a notable contribution to the field of cannabinoid chemistry. Marijuana, however, has several other ingredients, and it may be these ingredients, alone or in combination, which account for either possible health hazards or possible therapeutic usefulness of the drug.

Since recent studies confirm the fact that marijuana adversely affects driving, an obvious need is for the development of one or more roadside methods that can be rapidly employed to detect marijuana use in a manner similar as that used for alcohol intoxication.

Data suggest that marijuana produces only minimal EKG changes in healthy young adults. Tachycardia and reddening of the eyes are the most commonly and prominently experienced physical responses to acute doses. It appears unwise for those with existing cardiovascular deficiencies to use marijuana. Effects may vary significantly in persons with preexisting medical problems from those who are healthy.

Smoked marijuana produces acute, reversible, dose-related changes in brain waves as measured by computer analyzed electroencephalograms (EEGs). After subjects take doses that they are accustomed to, changes are slight and are not indicative of any particular pathology.

There is no definitive conclusion with regard to marijuana and genetic hazards. The retrospective design and other methodological imperfections of most human studies, whether chromosomal or immune, have prevented such conclusions. There is no conclusive evidence that marijuana consumption causes chromosome damage or impairment to immunity. It is difficult to conclude definitely whether marijuana depresses testosterone levels.

Evidence that marijuana, and especially its principal psychoactive ingredient delta-9-THC, is effective in reducing intraocular pressure in both normals and in glaucoma patients has been further confirmed. In a study where pain was experimentally induced in normal subjects, the pain was diminished by smoking marijuana.

Although some concern has been expressed over the possibility of marijuana use leading to the use of other drugs, particularly heroin, this progression theory has not been documented. Marijuana users are likely to use other licit and illicit drugs with a positive correlation between level of marijuana use and the variety of drugs used.

Compared to most pharmaceuticals, marijuana is quite low in biological toxicity. Thus, it is doubtful that deaths could be directly attributed to an overdose of hashish or marijuana.

CHEMISTRY AND CHARACTERISTICS OF MARIJUANA

Marijuana (cannabis) is a complex mixture of variable amounts of numerous potentially active substances. The recently reported development of relatively simple analytical procedures for the separation and quantitation of the major cannabinoids in marijuana is a significant advance (18, 19, 20, 21, 22, 23). The effects of the drug can now begin to be more meaningfully compared in different laboratories, and many of the past problems of conflicting data will be avoided simply by knowing the chemical composition of the sample. In fact, the United Nations has recommended that all research reports on the properties of marijuana include a quantitative account of the major cannabinoid content of the preparation involved.

In the past few years, the chemical study of marijuana has resulted in the isolation, characterization, and synthesis of numerous constituents of marijuana, thereby providing researchers with the opportunity to study the pure drug. Thus, the chemical advances represent the basis for the rational investigation of the pharmacology and toxicology of marijuana (11).

The recent introduction of a refinement in the synthesis of delta-9-THC, the major psychoactive drug in marijuana, has also been a notable contribution to the field of cannabinoid chemistry. This development has reduced the cost of synthesis and thus increased the availability of this drug for scientific investigation.

While primary interest has tended to center on delta-9-THC, the part played by several other ingredients may be important in producing marijuana effects. It may be these ingredients, alone or in combination, which account for either possible health hazards or possible therapeutic usefulness of the drug.

The detection and analysis of marijuana in human body contents, such as blood, breath, saliva, and urine, has posed a problem of importance both to basic research and to forensic medicine. It is of critical importance to the research field to develop a method that accurately determines how much smoked and/or ingested marijuana actually becomes physiologically available. These amounts may vary greatly because of losses that occur in consuming marijuana, delayed body absorption, and individual differences in ability to metabolize the drug.

Appropriate treatment procedures for an unconscious patient may be dependent on whether marijuana has been smoked or ingested. In other situations, diagnosis of a patient might be facilitated with the determination of marijuana intoxication.

The noted increase in the prevalence of marijuana usage has most likely resulted in an increase in numbers of people who drive while intoxicated. Since recent studies confirm the fact that marijuana adversely affects driving, an obvious need is for the development of one or more roadside methods than can be rapidly employed in a similar manner as those for alcohol intoxication. However, detecting marijuana use is much more difficult than detecting alcohol usage, and the need for simple, rapid detection methods is great. The quantities of drug involved are much smaller than with alcohol, and they are rapidly transformed into metabolites which differ chemically from the originally consumed material (24). It is critical to quantify the level of use for all of the purposes noted above.

During the past two years, significant progress has been made in improving detection methods (25, 26, 27, 28, 29). In addition to the newer thin layer chromatography (27) and high pressure liquid chromatography (25), three other techniques have shown potential. Radioimmunoassay (RIA) has been reported useful in marijuana detection, particularly in body fluids (26, 30, 31, 32). RIA is a method in which an antibody specific to a drug or its metabolites is developed and then "tagged" by means of a radioactive molecule in its structure. When a solution of the tagged antibodies and of the body fluid in which the drug to be detected is made, the radioactive markers are displaced proportionately to the drug quantity present. The accuracy of this technique is now being compared with more difficult procedures previously employed.

A second method under investigation is the enzyme multiplied immunoassay test (EMIT). This technique is based on a reaction similar to that in the RIA procedure. EMIT has the added advantages of less work and less sophisticated equipment and is therefore more rapid, which makes it suitable for rapid detection.

A final technique that shows promise utilizes breath samples in a manner somewhat similar to those presently employed in roadside alcohol intoxication detection. This technique will apparently be available shortly for traffic safety purposes (33).

It must be pointed out that marijuana and hashish vary greatly in THC content and therefore in the degree to which they intoxicate. Another drug available in the illicit market is hashish oil, which has a THC concentration of 40 to 50 percent, as compared to a 1- to

2-percent THC content of the majority of marijuana available in the United States. These more potent cannabis are becoming increasingly available, and use of these drugs, especially by the novice user, may result in adverse reactions, such as acute panic and marked impairment of driving and other psychomotor skills.

PHYSIOLOGICAL EFFECTS

Smoking or ingesting marijuana creates predictable physical and psychological changes which last for a few hours. While the dosage taken and individual differences in personality, setting, expectation, and/or previous drug experience contribute to a varied reaction, the variability in acute effects appears to be no greater than other psychoactive drugs.

A vast amount of information has been accumulated by researchers regarding acute and chronic effects of marijuana on humans. Recent research efforts have concentrated on the chemistry of marijuana and the less obvious effects on humans (other than hormonal changes and acute drug effects) in populations other than self-selected marijuana users. To date many, if not all, of the acute effects have been reported.

Cardiovascular Effects

Marijuana has long been known to produce marked cardiovascular effects (34, 35). Previously, some initial data had caused concern regarding the possibility that electrocardiographic (EKG) changes occur during acute marijuana intoxication (36). Since that time, a number of researchers have reported on findings where cardiovascular dynamics were examined some time after the administrations of large doses of THC. Their data suggest that marijuana produces only minimal EKG changes in healthy young adults (37, 38, 39). Nonspecific P or T waves and occasional premature beats were noted.

Tachycardia and reddening of the eyes are the most commonly experienced physical responses to acute doses (11, 40). Heart rate slowing and blood pressure drops developed in studies with prolonged administration of oral doses of 30 mg. delta-9-THC given every four hours. Plasma volume expansion developed along with blunting of peripheral vascular reflexes (37). While tolerance developed to the orthostatic hypotension, the supine hypotensive effects persisted throughout the period of drug administration. These changes point to a two-phased action of THC, with an increase in sympathetic activity which involves the heart and peripheral blood vessels at low doses and a centrally mediated sympathetic inhibition at higher doses (41).

Because of this reported marijuana-induced tachycardia, some concern was generated over the possible adverse cardiovascular effects of the drug, especially in those people with coronary disease. Several reports have confirmed the finding that marijuana use decreases exercise tolerance prior to the onset of angina (chest pain) in those with heart disease (42). Therefore, it appears unwise for those with existing cardiovascular deficiencies to use marijuana.

The contrasting fact that marijuana produces minimal changes in heart function (other than rate increase) in healthy young men, points to the fact that marijuana effects may vary significantly in persons with preexisting medical problems from those who are healthy. The majority of studies have, of course, been done on youthful, selected, normal volunteers.

Pulmonary Effects

The effects on the pulmonary function have been of great interest to researchers, since smoking remains the most common means of marijuana consumption. Initial reports indicated mainly adverse findings in frequent chronic marijuana users, including chronic cough, bronchitis, and obstructed pulmonary defects (43). However, more recent studies have reported promising findings regarding bronchodilatating effects, with possible therapeutic implications after marijuana smoking. Acute administration of either smoked marijuana or oral doses of THC produced significant increases in bronchodilatation and reversed experimentally induced bronchospasm in young adults with bronchial asthma (44, 45). These more promising findings may contradict previous reports, because they utilized a highly sensitive measure that will detect very small changes in pulmonary function, which was not employed in previous research investigations.

Chronic smoking may produce different and/or less useful effects than acute chronic administration as indicated by pulmonary changes during periods of chronic administration (47). One study reported significant impairment in pulmonary function tests in a group of chronic marijuana smokers (47). Further reduction in pulmonary function test performance was reported in this study which utilized volunteers smoking three to ten marijuana cigarettes daily for 21 days. One outpatient study of youth with varying tobacco cigarette habits reported more improvement in pulmonary function during an eight-week period of abstinence in a cannabis smoker subgroup (48).

In a recent study of the respiratory effects of smoked marijuana and orally ingested delta-9-THC, the effects of the drugs on the respiratory response curve were examined. Researchers reported that both the synthetic and natural material produced a respiratory depression in a group of previously chronic users (49). While the produced effect was minimal, the authors point to the possible relevance of this to people with chronic lung disease and/or central nervous system impairment of respiratory regulation.

Neurological Effects

Although perceptual, cognitive, and mood changes are reflected in changes in the nervous system activity, simple one-to-one correlations between behavioral changes and brain activity are rare, as with any psychoactive drug. However, the critical issue is the length of the effect.

Most recent studies report that smoked marijuana produces acute, reversible, dose-related changes in brain waves as measured by computer-analyzed EEGs (50, 51). After doses subjects are commonly accustomed to, changes are slight and are not indicative of any particular pathology.

Marijuana does not appear to have unique qualities among CNS active drugs when measured by scalp EEGs. Changes in EEGs recorded from deep brain structures have not, however, been seen with any other drug. These changes have been well-described in monkeys, and similar effects have been reported in a small number of humans (52). However, the behavioral implications of these neurological changes have not been determined.

Subjects given very large doses of THC or marijuana showed marked changes through scalp EEGs and evoked potentials. Increased alpha abundance, ataxia, hypersomnia, increased tendon reflexes, tremor, tonic muscle contractions, and myoclonus followed administration of these doses (53, 54).

While total sleep time increases after marijuana consumption, REM sleep decreases (53, 54). State four sleep remains unaffected; thus, marijuana is unlike any sedative-hypnotic drug (55). When marijuana use is stopped after a period of prolonged administration, REM sleep measures a sharp rebound above baseline levels. In comparison to the minimal changes in wakening EEGs after marijuana consumption, sleep EEG changes are very dramatic when the drug is taken either acutely or chronically (55).

Metabolism Effects

Studies have described glucose tolerance in a small group of subjects given intravenous doses of delta-9-THC (56). A lower dose of THC given in the form of smoked hash had no effect on blood glucose, although blood lactic acid decreased (57). Some have suggested that there is some marijuana effect on glucose transport mechanisms (58). However, it would be purely speculative to use these changes to explain the craving for sweets often reported by marijuana users.

Genetic and Immune Systems Effects

The question of a marijuana-induced impairment to the body's immune response continues to be probed, and the resulting research findings are conflicting (59, 60, 61). This issue is of critical importance, because of its potentially far-reaching clinical implications.

Although a number of researchers have reported findings which suggest that marijuana interferes with cell-mediated immunity (62, 63, 64), others have not found such evidence (65). Some of the conflicting findings may have resulted from methodological variations, but the clinical significance of the positive findings remains in considerable doubt (66).

One study employing well-controlled, closed experimental ward conditions found initial evidence of impaired immunity among the subjects upon their admission to the study (67). However, by the 63rd day of controlled administration of marijuana, their immune response had returned to normal. These findings suggest that the impairment of immunity detected in these subjects and other marijuana smokers may be causally related to factors other than marijuana use.

The implications of laboratory findings of inhibitions of DNA, RNA, and protein synthesis--all basically related to cellular reproduction and metabolism--are currently unknown. These findings, based on in vitro study of animal and human tissue, are being followed up and extended (11).

Basic biomedical research indicates the potential of marijuana for mutagenic and carcinogenic effects. Several cytologic and cytochemical studies have reported adverse effects (66, 67, 68, 69, 70, 71). The preliminary data suggest the following findings:

- marijuana and tobacco smoke together produced more abnormalities to the lung cells of mice than did tobacco smoke alone;
- in human lung cultures, marijuana smoke produced more anomalies in cells than was found after exposure of the cultures to tobacco smoke; and
- a similar enhancement of aberrant transformation was found in hamster cell cultures after exposure to whole smoke from either tobacco or marijuana.

The researchers observed not only marked morphologic changes in the exposed cells but also found consistent evidence of a decrease in the mitotic index; an increase in cells with 4n DNA, and, after a period of time, a decrease in DNA synthesis. Further support for the mutagenic capacity of marijuana has been put forth by researchers utilizing mice inhalation studies (69). Still others have suggested that because the localization of delta-9-THC is in the body fat, particularly in the liver, lung, and testes, and only disappears slowly from the plasma in man, it would seem that all of these tissues should be particularly vulnerable to damage (72).

Despite these varied findings, there is no definitive conclusion with regard to marijuana and genetic hazards. The retrospective design and other methodological imperfections of most human studies, whether chromosomal or immune, have prevented such conclusions. For example, information on nutrition, health care, recent radiation exposure, and drug use pattern, which are all known to affect both the genetic and immune systems, is usually determined retrospectively from subjects and is of questionable validity. The potential for inaccuracy is large and seems to prevent any attempt to identify a deleterious effect of a specific drug, even if the composition is known. These types of methodological questions could be resolved by a collaborative research effort by several laboratories, especially those now reporting conflicting findings, utilizing a single prospective double-blind research design with appropriate control groups.

No information exists on the teratogenic effects in humans, and several generations may be needed to detect them. The existing reports on teratogenic effects in animals are conflicting and reflect numerous methodological problems.

Because of the limitations mentioned above, it must be stated that to date there is no conclusive evidence that marijuana consumption causes chromosome damage or impairment to immunity.

Endocrine and Sexual Functioning Effects

The study of androgens and their correlations with a wide variety of pharmacologic agents, pathophysiologic states, and various forms of behavior has become of increasing interest to researchers. Recent methodological breakthroughs have provided for realistic testing and resulted in a vast growth of data regarding the role of androgens in health and disease. However, a number of problems still confront this research, and the findings are incomplete.

A folklore has existed about the effects of marijuana on sexual behavior and functioning, including anecdotal reports of heightened sexuality for both male and female marijuana users. A few preliminary studies have been conducted regarding the effects of marijuana or specific marijuana components on testosterone metabolism (73, 74, 75, 76). Early studies reported adverse consequences of marijuana use on sexuality (77, 78). One author cited three cases of males developing gynecomastia, which appeared to be related to heavy usage over a prolonged period.

These findings prompted another group of researchers to study the plasma testosterone levels in adult males who had a history of frequent marijuana use (76). They failed to find significantly lowered testosterone levels in subjects upon admission to the study. Further, they were unable to show a decrement of testosterone levels associated with marijuana smoking in a controlled laboratory setting. However, another recent study reported that males who were frequent users (10 or more marijuana cigarettes per week) and those who smoked five to nine cigarettes per week had significantly lower plasma testosterone levels than the nonuser control group (75). These authors presented data showing significant drops in plasma testosterone levels and luteinizing hormonal levels two and three hours after smoking a single marijuana cigarette. In a chronic administration study, subjects showed no significant drop in levels after four weeks of daily marijuana smoking. However, with continued smoking, they had significant drops in luteinizing hormone, followed by falling testosterone levels and follicle stimulating hormonal levels.

Thus, the data from reports finding no marijuana related hormonal changes are quite consistent with studies that do, if the different time periods of marijuana use are considered (79). It must also be pointed out that while the two major studies are conflicting, they are very recent and no replication of either has appeared in print. Therefore, it is difficult to conclude definitely whether marijuana depresses testosterone levels. It may be that marijuana has both an acute and a chronic effect. The study which found positive changes had data to support the notion of an acute effect which lasts possibly for less than an hour. Therefore, the once-a-day blood sample drawn in the other investigation may have been insufficient to record acute cut transient drops associated with marijuana smoking in a controlled, experimental setting. However, this does not explain why they failed to see lower levels in the chronically using group (79).

The biological significance of the reported hormonal changes remains unclear, and these findings must be interpreted with caution. Most existing discussions on the implications are strictly speculative in nature.

The decreases in circulating testosterone levels that have been observed to date in association with chronic, intensive marijuana use have generally not resulted in subnormal testosterone concentrations (80). For otherwise healthy individuals, there is presumably a large "safety zone" in terms of necessary levels of testosterone before actual evidence of hormonal deficiency might occur. Therefore it is reasonable to assume that specific biologic consequences of a sustained depression in circulating testosterone would be seen mainly in men with existing impaired sexual functioning. These changes may also have importance for prepubertal or pubertal males, although this has not yet been determined scientifically.

Even more speculative arguments exist that there is a possibility that frequent, intensive marijuana use during critical stages of pregnancy might result in disruption of normal sexual differentiation patterns of the male embryo (75). High material intake of marijuana might be required to produce adverse effects, but there is also a possibility that testicular or hypothalamic tissue might be more sensitive to drug effects during this time than during adulthood. While there is an absence of clinical evidence for these consequences, it would appear unwise for pregnant women to use marijuana (79).

A number of studies have reported enhanced sexual activity associated with marijuana use (81, 82, 83, 84). However, the psychological, social, and pharmacologic factors associated with sexual activity probably interact in complicated ways, as is the case with most other drug effects on sexual behavior. For example, as with alcohol, the dose is important. Small to moderate doses of marijuana appear to be most effective as releasers of inhibitions (84). Larger, chronic doses may actually diminish sexual interest and potency in males.

It is also important to consider the role of the set and setting in a sexual situation. That is, the expectation of an individual and/or partner, the mood, level of anxiety, previous sexual experience, and other factors provide a large number of variables (73). Further, acute marijuana use may produce perceptual changes in time and tactile sensations that may be interpreted as enhancing, detracting, or not altering the experience. When the sedative effects of high doses of marijuana are predominating, it is possible that acute and transient episodes of sexual dysfunction might occur (73).

Behavioral consequence of depressed testosterone may be more marked than the biologic (73). Studies demonstrating a direct correlation between testosterone and aggressive behavior (85, 86) might explain reports of greater passivity or lack of motivation on chronic, frequent marijuana users. However, there are no direct data to verify this. Among men with Klinefelter's syndrome, there is a great variability in plasma testosterone levels, although their average level is significantly lower than normal. Many of these men have histories of criminal behavior. The data, however, do not suggest that men with higher levels of testosterone are more aggressive than those who have lower levels.

Finally, it must be underscored that all issues raised to date demand further study. The conflicting data on lowered plasma testosterone levels in men indicate a need for more careful evaluation of single daily testosterone measurements in individuals, even when they are obtained on multiple occasions (87). Further, while the majority of data is strikingly consistent with that obtained from animal studies and is closely parallel with other well-documented endocrine models, it appears necessary to broaden the scope of such studies to include other age groups and larger numbers of subjects and to study populations here and abroad that have had chronic and frequent experience with marijuana.

Other Physiological Effects

Evidence that marijuana, and especially its principal psychoactive ingredient delta-9-THC, are effective in reducing intraocular pressure in both normals and in glaucoma patients has been further confirmed (89, 90, 91). While some question exists whether this effect is due to a nonspecific drug-induced relaxation shared with other sedative drugs or to a more specific marijuana reaction, more recent evidence suggests it is THC-specific (91). These issues will be discussed in more detail under the section on therapeutic aspects of marijuana.

Intravenous administration of water infusion of marijuana resulted in gastroenteritis, hypoalbuminemia, hepatitis, and many cardiovascular changes secondary in part to hypovolemia (92). However, it was not determined if these symptoms were marijuana effects or, more likely, the nonspecific effects of injected foreign plant material.

EFFECTS ON MENTAL AND PSYCHOMOTOR PERFORMANCE

More sophisticated attempts to measure various aspects of psychological and psychomotor performance have been generally consonant with subjective reports. The majority of reported impaired functioning on a variety of cognitive and performance tasks due to marijuana intoxication are dose-related. The investigations administering the smallest doses reported the slightest effects (11, 93, 94, 95). Impaired memory, altered sense of time, and decrements of performance on a number of tasks which involve reaction time, conceptual formulation, learning, perceptual motor coordination, and attention have been experimentally confirmed (93, 94, 95, 96, 97, 98, 99, 100). Generally, the more complex the task, the greater the disruption produced by acute intoxication. Tasks which are relatively simple and with which the person is familiar are minimally affected. As the task becomes more demanding and unfamiliar and/or the dose increases, performance decrements become larger. At lower doses, evidence confirms users' assertions that they are often able to "suppress" and/or "control" the marijuana high when the situation calls for it.

There are a number of reports on locus of memory impairment from marijuana intoxication (101, 102, 103). It appears that the memory defect is due to a storage problem rather than acquisition or retrieval. The concern that marijuana may increase the hypnotic

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suggestibility of those using it has not been confirmed in laboratory studies (104).

Effects on Sensory Functioning

Changes, particularly enhanced auditory, visual, and tactile awareness and sensitivity, have been commonly reported by marijuana users. Investigations of the drug effects of various aspects of sensory functioning have failed to confirm such changes in cutaneous sensitivity through objective measurements (105). The decrease in auditory signal detection during marijuana intoxication may be due to a decrease in sensitivity rather than a change in criteria (99).

In one study, small doses of oral THC administered to patients suffering from pain demonstrated mild analgesic effects. However, 20 mg. given orally produced many unpleasant side effects, including dizziness, ataxia, blurred vision, and somnolence, etc. (106). In another study where pain was experimentally induced in normal subjects, the pain was diminished by smoked marijuana (107). Pain secondary to spinal cord injury has also been reported to decrease with marijuana use (108).

Driver Performance

Because of the role that the automobile plays in our society, the possible significance of marijuana intoxication for traffic safety has been of interest to researchers. Data now indicate that driving performance is impaired by marijuana at doses thought to be common (109, 110, 111). In spite of the fact that many marijuana users have readily admitted that their driving ability is impaired when intoxicated (109, 112), it appears that more users drive today while intoxicated than a few years ago (109, 113).

Existing data derived from driver test course performance, actual traffic conditions, and the experimental study of components of the driving task all indicate that driving under the influence of marijuana is hazardous (109, 111, 114).

The increasing simultaneous use of both alcohol and marijuana by drivers poses a threat that may exceed that of either alone. The risk factor involved in the various levels of intoxication needs to be determined, both alone and in combination with alcohol and other drugs.

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While there has been scant study of the relationship of marijuana smoking to possible airplane piloting impairment, evidence related to driving is at least partially relevant. Skills, such as detection of peripheral stimuli and complex psychomotor coordination required by driving, are of equal importance in flying. One preliminary study has shown that under flight simulator test conditions, experienced pilots demonstrated marked deterioration in performance after smoking marijuana containing only 6 mg. THC (115). However, more detailed studies are needed to confirm these initial data.

MARIJUANA AND PSYCHOPATHOLOGY

The psychiatric consequence of marijuana use (and different degrees of marijuana use) remains an unresolved controversy. The research findings to date are indeed conflicting and far from conclusive. A major problem pervading all research is the methodological inadequacies of most designs (116, 117). There has been a lack of consensus regarding syndrome definitions, and the issues of cause and effect have been difficult to separate from mere association (116).

A number of psychiatric disorders are clearly associated with marijuana use. However, whether the psychopathology is an antecedent to use, the result, or simply coincidental has not been established. All three cases are probably true, depending on the individual and numerous variables (116).

Acute Adverse Reactions

The syndromes most readily related with marijuana use are those temporarily linked to consumption of marijuana that can be measured in a controlled experimental laboratory setting. Early studies reported that THC, in sufficient doses, produced subjective effects that could not be distinguished from LSD (118, 119).

A group of researchers described a number of patients exhibiting symptoms of an acute toxic psychosis manifested by excitement, confusion, disorientation, delusions, visual hallucinations, depersonalization, emotional instability, and delirium (120). The symptoms were of short duration (a few hours to a few days), and they returned to "normal." The authors suggest that the potency, dosage schedule, and younger ages were generally related to the acute toxic reaction.

A number of recent reports have suggested that an acute panic anxiety reaction appears most likely to occur in inexperienced marijuana users and after consuming more potent materials. Personality variables resultant in poor coping skills are often involved in these reactions.

These reports are quick to point out that the adverse symptoms diminish with authoritative reassurance and/or a few hours after the immediate effects of the drug have worn off (101, 106, 121, 122).

Some researchers have differentiated between panic reactions and toxic psychoses in the categorization of acute adverse reactions (123, 124). They support the notion that the vast majority of all acute adverse reactions to marijuana are panic reactions in which the users interpret the psychological and/or physiological effects of the drug to mean that they are "going crazy" or "losing their minds." They contend that the numerous variables of set, setting, and personality factors are responsible for most adverse reactions.

In contrast, they explain that toxic psychoses are temporary malfunctions of the cerebral cortex due to the presence of toxins in the body, and they disappear when the toxins disappear (123). They classify the clinical manifestations of the toxic psychoses in terms of a number of characteristics, including disorientation, confusion, auditory and visual hallucinations, and a prostrate appearance. In general, these symptoms resembled the delirium of high fever (123).

Other authors have suggested that the critical factor in describing toxic psychosis concerns errors in judgment (116, 125). They feel that paranoid thoughts and hallucinations may be frequent concomitants of the marijuana experience, especially with the more potent materials. They state that deficits in judgment and the presence of confusion and/or delirium define a toxic reaction (125). Panic reactions consist of an overwhelming anxiety, a fear of losing one's mind or dying, and/or a sense of losing control or helplessness in response to drug-induced symptoms.

Further, toxic reactions could also be dose-related, while panic reactions may occur at any dose which is unfamiliar to the user. Factors relating to the set, setting, and/or personality factors which may lead the user to respond to the pharmacologic effects of marijuana with severe anxiety are generally responsible for acute panic reactions (116).

These reported differences underscore the lack of consensus in the field as to the definition of the syndrome. Another unresolved issue resultant in conflicting reports is the subject of frequency and relative risk. Case reports of adverse reactions are insufficient to clarify the frequency of occurrence among the general population of persons who have used or experimented with marijuana on a casual or regular basis.

A more recent report suggests that the frequency rate of panic states due to marijuana intoxication may not be insignificant (126). Again the reactions appear to be related to the set, setting, and personality factors.

It is clear that these methodological and theoretical issues must be resolved. There is a need for syndrome definition, controlled laboratory administration of dosages, and surveys of larger samples of marijuana users to establish the risk of acute adverse reactions to marijuana.

Flashbacks

Another reported consequence of marijuana use is the spontaneous reoccurrence of feelings and perceptions, also known as "flashbacks" (123, 124, 127). Some reports suggest a causal relationship of flashbacks to prior use of hallucinogenic drugs (123, 124). However, the etiology of such reactions remains unclear. Those who have experienced them seem to require minimal treatment, if any at all (11).

As with acute adverse reactions, the risk of flashbacks has not been clinically determined. There is a need for detailed surveys of marijuana users to define any prior history of drug taking (particularly LSD) to establish the relative frequency of flashbacks. Subjects who have participated in studies of acute, prolonged administration of marijuana use could provide data relevant to this issue.

PROLONGED REACTIONS

The greatest controversy regarding psychiatric consequences of marijuana remains in the area of prolonged reactions. The syndromes attributed to marijuana by various reports are psychotic reactions, including the triggering of schizophrenic states and cannabis psychosis; and nonpsychotic reactions, including character changes and alterations in life style, neurotic levels of anxiety and depression, an amotivational syndrome, and heavy use of other drugs (116). In all of these conditions, it has been difficult to separate the issues of cause and effect from mere association.

Triggering of a Schizophrenic Reaction

Most researchers are in agreement that marijuana can precipitate schizophrenic syndromes in vulnerable individuals. Some feel that the psychosis is more related to the personality of the user rather than any pharmacologic effect of the drug (123, 124). One report described an increased psychopathology evidenced as schizophrenic and paranoid symptoms in patients with histories of personality or psychiatric disorders after acute marijuana intoxication (120).

One unresolved issue concerns the diagnosis of the premorbid state in the cases of psychosis referred for psychiatric treatment. More recent studies reported that intravenous THC remains in plasma for three days, and its metabolites are excreted in urine and feces for more than eight days (128). This finding confounds the difficulty of separating the toxic and personality variables involved in triggering an acute schizophrenic reaction following marijuana consumption. Until there is more accurate clinical research, it is impossible to conclude the risk factor of an acute schizophrenic reaction.

Cannabis Psychosis

The majority of literature on cannabis psychosis is from the far eastern countries. One author suggests that the quantity smoked in the east far exceeds that smoked in the United States (129). The eastern literature reports an acute marijuana psychosis associated with extremely heavy use, with the effects lasting for one to six weeks. Most agree that a marijuana psychosis syndrome results in symptoms different from those characteristic of schizophrenia. The symptoms include excitement, confusion, manic state possibly leading to impulsive acts of violence, and sometimes a residual amnesia (116).

NIDA supported three studies of heavy chronic users conducted in Jamaica, Greece, and Costa Rica, which failed to detect evidence for a cannabis psychosis (130, 131, 132). However, given the comparative rarity of this syndrome and the small sample sizes used, it is possible that such a consequence was missed.

Nonpsychotic Prolonged Adverse Reactions

Studies of user and nonuser populations have provided some data as to neuropsychological changes, changes in life style, and amotivational syndrome associated with marijuana use. In a study comparing groups of LSD/mescaline users with marijuana/hashish users and nondrug users, researchers employed a battery of sophisticated psychological and spatial perceptual ability tests (133). When followed up a year later, all three groups scored well within normal limits. No evidence could be found to support the notion of the existence of a neuropsychological deficit with either light or heavy marijuana users. In a similar study of heavy users, researchers arrived at the same conclusion (134). It should be pointed out, however, that each study reminded readers that this did not suggest that no organic changes occurred, since psychological tests were used. To measure organic changes, radiological or pathological evidence must be produced.

Studies measuring student performance have generally failed to prove evidence of impaired intellectual performance associated with marijuana use. In one major study, there were no differences in grade point average or educational achievement between users and nonusers. However, marijuana users had greater difficulties in deciding career goals and were more likely to have dropped out (135). Methodological problems in this study make the findings questionable.

Researchers have attempted to measure a possible amotivational syndrome (136, 137). These studies suffer from experimental design problems, since models for testing such a syndrome have had limitations. Tasks chosen by subjects may differ significantly from more realistic work tasks; the artificial environment of the research setting may provide atypical motivational conditions.

Two studies of marijuana administration, coupled with monetary reward for work performance, did find a decline in productivity among heavy marijuana users (136, 137). In one study, the task was simple and undemanding and could be carried out simultaneously with other activity (136). In another study, subjects were required to make wooden stools (137). The distinction between a direct effect on performance as a result of marijuana and on performance as a result of a decline in motivation is not easily made. One author has described an amotivational syndrome among marijuana users as changes including apathy, loss of effectiveness, and diminished capacity or willingness to carry out complex, long-term plans, endure frustration, concentrate for long periods, follow routines, or successfully master new material. Verbal facility is often impaired, both in speaking and writing. Such individuals exhibit greater introversion, become totally involved with the present at the expense of future goals, and demonstrate a strong tendency toward regressive, childlike, and magical thinking (138). He later listed four ways in which marijuana may enter into the amotivational syndrome: (1) persons who exhibit these traits may simply be attracted to the use of marijuana, (2) the individual may focus so much on his time and energy about cannabis use and associated activities that this largely substitutes for other behavior, (3) the passivity may be causally related to cannabis use through learning, and (4) repeated exposure to cannabis may result in a chronic brain syndrome (138).

Changes in values and behavior attributed to marijuana use may have preceded use rather than the use affecting the changes in values. For many users, marijuana has had symbolic value as a means of expressing their displeasure for the society's value system. The group dynamics of marijuana use may reinforce these counterculture views of more conventional motivation rather than result from any pharmacological action of the drug itself.

There has been some concern over the possibility of marijuana use leading to the use of other drugs, particularly heroin. This progression theory, however, has not been documented. There is indication that there is a pattern of shifting from the use of one drug to another--primarily polydrugs, not heroin (139). Marijuana users are, however, likely to use other licit and illicit drugs with a positive correlation between level of marijuana use and the variety of drugs used (140).

CRIMINAL/AGGRESSIVE BEHAVIOR

To date, there is no evidence that marijuana use causes criminal behavior. In a study of young prisoners, nonusers and occasional users had typical criminal profiles; regular users of only marijuana were better socialized and adjusted, although more deviant than college students (141). Studies examining possible resultant hostile behavior suggest that the usual effects of marijuana intoxication are to decrease expressed and experienced hostility (47, 142).

CHRONIC EFFECTS

Tolerance, a diminished response to a given repeated drug dose, has been verified by research (50, 130, 131, 132). Marked tolerance to the effects of marijuana doses commonly consumed in this country is not generally evidence because of relatively infrequent use and the generally low doses of psychoactive material. In countries where more frequent use of high dose is common, tolerance does develop to many of the psychological and physiological effects (37, 47, 136, 143, 144).

Marijuana dependence, defined by physical dependency following drug withdrawal, has been reported. The symptoms reported following discontinuance of high dose chronic administration of delta-9-THC include irritability, restlessness, decreased appetite, sleep disturbance, sweating, tremor, nausea, vomiting, and diarrhea (37, 143). However, these effects were reported after withdrawal from extremely high doses of orally administered THC under research ward conditions. Such effects have not commonly been observed in other studies nor has a "withdrawal syndrome" typically been found among users here or abroad.

THERAPEUTIC ASPECTS

Marijuana has been used as a medicinal agent for over 3,000 years. There are written references as to its therapeutic use from the 15th century B.C., and it is still an important folk medicine in many cultures.

During the latter half of the 19th century, there was a refound interest in the therapeutic use of cannabis. Hundreds of reports in the medical journals of that time attest to this. Doctors tried marijuana preparations for a variety of illnesses including tetanus, rabies, epilepsy, and rheumatism and reported favorably on its anticonvulsant, analgesic, and muscle relaxing properties. Others who felt it was a sedative-hypnotic used it for cases of neuralgia, dysmenorrhea, asthma, and sciatica.

There were promising reports on marijuana use for the treatment of morphine and alcohol addictions. Doctors claimed successful treatment with marijuana of obsessive compulsives, melancholics, and other chronic psychiatric disorders.

Although the encouraging testimonies continued, the early 1900s brought a decline in the use of marijuana for several reasons. It was difficult to cultivate with controlled potency, resulting in inactive and/or extremely strong batches. It was also difficult to store marijuana on doctors' and druggists' shelves, since many of its extracts became inactive rapidly. Because the drug is insoluble in water, it was often ingested, minimizing its effects by two or three times. At the same time, there were rapid developments of other, more stable water-soluble hynotics and analgesics. Finally, in 1937, marijuana was classified as a narcotic under the Marijuana Tax Act. From that point, it was rarely employed in medical practices.

Current Research

Controlled systematic research into the clinical pharmacology of marijuana has been conducted for only about 10 years. The numerous chemical breakthroughs cited previously have allowed for these investigations. Although marijuana's psychoactive properties and tendency toward tachycardia make it undesirable for most medical purposes, it does, in fact, have one very desirable property. Compared to most pharmaceuticals, it is quite low in biological toxicity. Thus, it is doubtful that deaths could be directly attributed to an overdose of hashish or marijuana.

Intraocular Pressure Reduction

One of the most promising therapeutic applications of marijuana is in the treatment of glaucoma. In 1970, a group of researchers studied the various ocular alterations produced by marijuana smoking (89, 145). They reported a consistent and significant decrease in intraocular pressure in normal subjects. Subsequent research confirmed similar findings in subjects with diseased eyes, and the effect was as great as with those produced by traditional medicine. Still others have reported the same findings (91) and have ruled out the possibility of intraocular pressure reduction being due to any relaxing or euphoriant effects of marijuana as suggested by some (146).

Recently, through a controversial court ruling, an individual suffering from advanced glaucoma has been permitted marijuana for therapeutic use under strict governmental controls. In October 1976, Howard University was granted permission to treat a limited number of glaucoma patients with marijuana (147). These studies will begin to supply the field with the necessary data to further investigate the therapeutic properties of marijuana.

Antiemetic Effects

The use of THC as an antiemetic with cancer patients receiving chemotherapy shows unusual promise. A frequent side effect of chemotherapy is marked nausea and vomiting, and traditional anti-nausea drugs have not been notably successful in reducing the side effect. THC was found in a double-blind study to be effective in virtually all patients receiving it (148).

Bronchodilatation Effects

As mentioned previously, marijuana has bronchodilatating effects--dilating pulmonary air passages and decreasing airway resistance. Based on observations of this effect in normals, marijuana has been administered to asthmatics, reversing bronchoconstriction for hours (149). Thus, it has reportedly had a more persistent action than traditional medication (150).

Since marijuana has an irritant quality when smoked, efforts to develop an aerosolized delta-9-THC are being tried (151). The initial results are promising, with a mean peak increase above baseline of 89 percent--much greater when the same amount was smoked. In addition, other effects, such as increased heart beat and a "high," have not been as pronounced.

Anticonvulsant Effects

The investigation of possible anticonvulsant effects are at this time still preclinical. Some initial animal studies with artifically induced convulsion indicate that delta-8-THC and delta-9-THC blocked seizures in a dose-related manner with results qualitatively comparable to Dilantin (153).

Very little human investigation of the antiepileptic properties of cannabis has been conducted. One pilot study to examine the effects of tetrahydrocannabinols on children receiving medication reported that two cases showed improvement after one cannabinoid administration, while transfer to a second produced mixed results (152).

Convulsant as well as anticonvulsant action has been reported in marijuana studies. However, this has been when high, chronic, or toxic doses were administered (154, 155).

Sedative-Hypnotic Effects

Researchers have reported that delta-9-THC reduces REM sleep, although it increases the total sleep time, like most hypnotics (156). Unlike other hypnotics such as barbiturates, REM sleep does not rebound following withdrawal after six consecutive nights of usage (or, presumably, similar short-term use patterns), although mild insomnia has been observed. Others have reported a reduction in dose of barbiturates needed and an increase in sleep time following delta-9-THC administration in laboratory animals (157).

Analgesic and Preanesthetic Effects

In preclinical animal studies, researchers have confirmed an analgesic effect with marijuana (158). Tolerance to analgesia, sedation, and ataxia was reported after eight days.

In a double-blind study with novice and experienced marijuana smokers, researchers reported a significant increase in pain tolerance in both groups, with greater analgesia in the experienced group (159). In other studies with cancer patients, significant pain reduction was reported following delta-9-THC administration (126).

The investigation of marijuana as a preanesthetic agent has produced mixed results. When delta-9-THC was administered prior to inhalation anesthesia, the requirement for cyclopropane and halothane was decreased (160). When 200 mcg/kg THC was given intravenously to normals, a marked sedation with minimal respiratory depression was noted (161). Additionally, salivation was diminished, bronchodilatation occurred, and cardiac output increased on the basis of the anticipated tachycardia.

Additional studies are needed to definitively conclude the exact role of marijuana, if any, in anesthesiology.

Retardation of Tumor Growth

In animal studies, there has been a reported reduction of tumor size from 25 to 82 percent with oral delta-8-THC, delta-9-THC, and cannabinal administration, depending on the dose and duration of treatment (162). Cannabinoids increased survival time by 25 to 33 percent compared to an increase of one half for cyclophosphamide.

In vitro studies confirming animal inhibition of growth suggest that certain cannabinoids possess antineoplastic properties by virtue of their interference with RNA and DNA synthesis.

Antidepressant Effects

No significant affectual change among moderately or severely depressed patients hospitalized for affective disorder was noted following administration of 0.3 mg/kg of delta-9-THC (163).

In another study of cancer patients receiving chemotherapy, mood elevation and tranquilizing effects were reported after delta-9-THC was administered three times a day (164). Further, cognitive functioning was unimpaired, appetite increased, weight loss was retarded, and nausea and vomiting were relieved.

Drug and Alcohol Abuse Treatment

In a study of alcoholics, marijuana produced a positive mood state and did not interfere with the arousal reaction, although it did produce increased heart beat and acute paranoia and confusion in three of the 27 subjects (11). The author noted no problems in the administration of marijuana and Antabuse together. While the findings are preliminary, they suggest the possibility of marijuana as a therapeutic adjunct for some alcoholics.

The investigation of the role of marijuana in narcotic detoxification is limited. In one rat study, high doses (5 and 10 mg/kg) of delta-9-THC blocked the appearance of wet shakes, escapes, diarrhea, and increased defecations. Further study is needed in this area.

Summary

There is acknowledgement that constituents other than delta-9-THC may have valuable therapeutic properties, if freed of some of the undesirable side effects noted with THC. It may be possible to produce a very wide range of chemical compounds that are broadly based on the chemical stucture of the cannabinoids, but with changes in that structure which can alter this action. Such chemically remote compounds may prove therapeutically more useful than with the natural material or its synthetic ingredients. They must first, however, be carefully tested for toxicity and therapeutic properties as with any other new compound.

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IV. THE LEGAL DIMENSION

This section provides a summary of existing marijuana possession and use legislation, in the context of both historical and current trends. It includes separate sections on international and United States laws, state level control legislation, existing record consequences processes, and the constitutional issues involved.

THE BACKGROUND OF INTERNATIONAL AND FEDERAL LAW

Any proposals for reform of state marijuana prohibitions must be assessed against the backdrop of the United States' international obligations under the 1961 Single Convention on Narcotic Drugs and the provisions of the federal Controlled Substances Act of 1970. (Under our federal system, a treaty among nations imposes no duties on the individual states of the United States.) However, the range of alternatives available to the states is framed by both the treaty and the federal statute in that any direct conflicts between state and federal law are impermissible under the Supremacy Clause of the U.S. Constitution.

The Single Convention on Narcotics Drugs of 1961

The only international law regulating marijuana[1] is the 1961 Single Convention on Narcotic Drugs, to which the United States became a signatory in 1967.[2] The objective of the Convention is to limit the use of marijuana and international traffic in the drug and other specified drugs to medical and scientific purposes. Thus all traffic in the named drugs for purposes other than medical or scientific research is outlawed.

As a result of the Convention, the Federal Government is thus obligated to prohibit cultivation and distribution of marijuana for nonmedical purposes. Although the states are not thereby obligated to supplement the federal trafficking offenses with ones of their own, it does follow that the states may not adopt a regulatory approach under which marijuana could be legitimately distributed for nonmedical purposes because distribution would still be a crime under federal law. Such a regulatory scheme would be void under the supremacy clause. In short, then, "legalization" of marijuana in a regulatory context (like alcohol and tobacco) requires federal action which now would be in defiance of this country's international obligations.

On the other hand, the Single Convention, as construed by the National Commission on Marijuana and Drug Abuse, does not obligate a signatory to impose any sanction, criminal or civil, on consumption-related behavior, including possession for personal use. Only three provisions of the Convention deal explicitly with possession. First, Article 4 of the Convention requires that parties to the Convention "take such legislative and administrative measures as may be necessary . . . to limit exclusively to medical and scientific purposes the export, import, distribution . . . use and possession of drugs" (including marijuana). The language "such . . . measures as may be necessary" manifests an intention of the Convention to leave the signatories flexibility in designing policies of discouragement. Under this view, discouragement could take the form of educational programs rather than civil or criminal punishments.

Second, Article 33 requires that a party to the Convention not permit the possession of drugs except under legal authority. Once again there is no specific direction that simple possession be punished. The goal of Article 33 could be met by both restricting the production and sale of marijuana and confiscating it as contraband rather than applying sanctions against the user of the drug.

Third, Article 36 directs party nations to adopt measures making certain listed activities, including possession, "punishable offenses." While some have argued that this provision requires prohibition of personal use, the National Commission concluded that the word "possession" in Article 36 refers not to possession for personal use, but to possession with intent to sell. This conclusion is buttressed by the fact that the other activities condemned in Article 36 relate to the cultivation or distribution of the drug; the word "use," though employed liberally throughout other sections of the Convention, does not appear in Article 36. Moreover, the entire thrust of the Convention is directed toward regulation of traffic--not use--in illicit drugs.

Even assuming, however, that the Single Convention does require its signatories to make simple possession a crime, the individual states of the United Sates are not bound by the Convention to punish possession. The international obligations created by the treaty run between the Federal Government and the other parties to the Convention. Under our federal system, a treaty among nations imposes no duties on the individual states of the United States. The obligation to criminalize possession for personal use--if there be such an obligation--is met by the federal statute which makes simple possession a crime.

The Controlled Substances Act of 1970

The Controlled Substances Act of 1970, 21 U.S.C. 801 et seq., is the current repository of federal proscriptions relating to cultivation, traffic, and use of illicit drugs. Under §404(a) of the Act, simple possession of any controlled substance is a misdemeanor. A first offense is punishable by a jail term of up to one year and a fine of up to $5,000. For subsequent convictions, the maximum penalties are doubled. Since 1969, the Justice Department has acknowledged that it does not seek out violations of the possession laws and does not prosecute persons who possess small, noncommercial amounts. Control of such consumption-related behavior has been left entirely to the discretion of state and local authorities. It should be noted that even though simple possession of marijuana technically remains a federal crime, the states are free under the Supremacy Clause to repeal penalties altogether. They are under no compulsion to seek out violations or to prosecute persons for violations of federal law.

Penalties authorized for distribution-related offenses under the Controlled Substances Act depend upon the "schedule" into which the particular drug has been placed. Marijuana is classified currently as a Schedule 1 drug, because it has no "recognized medical use in the United States." Under §401(b)(1)(B) of the Act, distribution-related offenses involving Schedule 1 substances are punishable by up to five years in prison and up to a $15,000 fine for the first conviction. The maximum penalties are doubled for subsequent offenses. Thus the sanctions available for trafficking in marijuana are more severe than those applicable to many other drugs which have greater abuse potential and dependence liability, merely because marijuana has no recognized medical use.

As discussed in the previous section, recent reports in medical literature have called attention to the potential therapeutic uses of marijuana. For example, a report issued by the Department of Health, Education and Welfare in 1975 stated that the "most promising therapeutic applications" of marijuana are in the treatment of glaucoma and asthma and as an antiemetic for cancer patients undergoing chemotherapy. Other medical uses currently being investigated include its use as a sedative-hypnotic, as an anticonvulsant, and as an alternative in treating alcoholics.[3] On September 30, 1976, the Food and Drug Administration, with the approval of both the National Institute for Drug Abuse and the Drug Enforcement Administration granted a glaucoma patient permission to smoke marijuana therapeutically.

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If any of these medical uses is ultimately recognized, it is very likely that the drug will be reclassified and placed in either Schedule 4 or Schedule 5, which would make even a distribution-related offense either a minor felony or a misdemeanor under federal law. There are two methods of obtaining rescheduling: (1) approval by the Food and Drug Administration for a new drug application upon proof of a medical use and (2) petition to the Drug Enforcement Administration (DEA). The second method has recently been attempted, but the petition was denied on the ground that there is now no recognized medical use for marijuana. This decision of the DEA is currently being appealed to the Court of Appeals for the District of Columbia.[4]

SUMMARY OF CURRENT STATE MARIJUANA LAWS

State statutes governing marijuana use have changed substantially in recent years. The current laws reflect a reconsideration of the sanctions imposed against marijuana use, with a resulting trend toward reduced penalties. Particularly dramatic are the reductions in penalties for possession of marijuana for personal use, or simple possession. In the first phase of this trend, between 1969 and 1972, every state amended its penalties in some fashion, with the overall result a massive downward shift in penalties for simple possession. Overwhelmingly classified as a felony prior to 1969, simple possession of less than one ounce was treated as a misdemeanor in all but eight states by the end of 1972. In March of that year, the publication of the Report of the National Commission on Marihuana and Drug Abuse marked the beginning of the second phase of penalty reduction, which continues today. During this period, states have begun to explore noncriminal approaches to the disposition of casual users and first offenders while retaining a policy of discouraging marijuana consumption.

In many states, alteration of the marijuana laws has occurred in the context of adoption of the Uniform Controlled Substances Act, hereinafter referred to as the Uniform Act. Like the Uniform Narcotic Drug Act drafted nearly 40 years earlier, this new Uniform Act has achieved wide acceptance by state legislatures. At present, 45 jurisdictions have enacted it. The Federal Government's Drug Enforcement Administration has been actively seeking maximum acceptance of the Uniform Act, so that state drug laws will conform in structure and emphasis to the federal law.

The Uniform Act classified marijuana as a hallucinogen, not as a narcotic, thus bringing the law closer to prevailing scientific opinion. Classification of marijuana as a narcotic has generally withstood constitutional attack, but one federal court (in Virginia) and two state supreme courts (Illinois and Michigan) ruled the narcotics classification invalid. Currently, only three jurisdictions still classify marijuana as a narcotic.

Sale

Sale is usually defined by statute as distributing, delivering, dispensing, exchanging, transferring, or furnishing. Some states require that remuneration be involved--most do not. In the great majority of jurisdictions, sale of marijuana is a felony, subject to maximum sentences ranging from two years to life. Since 1969, however, legislatures have begun to treat at least some forms of sale as misdemeanors. Two states, Kentucky and Maine, have joined the District of Columbia in making first offense sale of any amount a misdemeanor. Seven other states have enacted provisions that grade sale offenses according to the amount transferred. In five of these states (Hawaii, Illinois, Indiana, South Dakota, and Tennessee), selling less than a certain amount (varying from 10 grams to two ounces) is punished as a misdemeanor.

Another selective approach to reduction of sale penalties is the exemption from felony treatment of an offense sometimes called "accommodation." This offense usually consists of delivery of a small amount of marijuana for no remuneration. It is intended to give lighter penalties (usually the same as for simple possession) to those who transfer small amounts of marijuana as favors to friends, as opposed to major traffickers who earn substantial sums from illicit sale.

Eighteen jurisdictions have enacted "accommodation" provisions: California, Colorado, Florida, Illinois, Iowa, Kansas, Kentucky, Michigan, Minnesota, North Carolina, Ohio, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Virginia, and the Virgin Islands. Ten of them set amount limitations beyond which a delivery will not be treated as a misdemeanor. The limitations range from 5 grams to 1-1/2 ounces, and the penalties range from a fine to one year in jail. The remaining eight jurisdictions set no upper limit on the amount transfered; in four of them the provision covers nonprofit sales as well as outright gifts. Mississippi, Missouri, Utah, and Vermont have reduced the penalty for gifts of marijuana while retaining the felony designation. In West Virginia,

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one who gives away less than 15 grams commits a felony but qualifies for that state's mandatory first offense conditional discharge. Reduced penalties for accommodation are also applied to a first offense by a minor in Delaware, and to a second offense in New Mexico.

Since 1972, nine states have substantially decreased their sale penalties, while only four have increased them. Even so, 12 jurisdictions still provide extremely heavy penalties for first offense sale. One who is convicted of sale in Arizona, California, Missouri, or Montana can receive up to life imprisonment, and in Virginia, Rhode Island, and Alaska he may receive up to 40, 30, and 25 years, respectively. Twenty-year maximum sentences are still available in Connecticut, Illinois, Mississippi, Nevada, and Puerto Rico. Of these 12 jurisdictions, five make no exceptions for less serious sale offenses.

Sales of as little as 2 ounces of marijuana expose the seller to a maximum sentence of at least five years in all but seven jurisdictions.

Most jurisdictions treat possession with intent to sell as if it were sale. However, in six states possession with intent is treated the same as simple possession; and six others have separate penalties for this offense that are slightly more lenient than those for actual sale.

Sale to a minor is a separate offense in 38 of the 54 American jurisdictions. In the remaining 16 jurisdictions, no distinction is made between sale and sale to a minor. Of the 38 jurisdictions singling out sale to a minor as a separate offense, most set the penalties at double those for sale.

In an increasing number of jurisdictions, the offense of sale to a minor is not applicable unless the seller is over 18 years old and is selling to one at least three years his junior. This three-year age differentiation is intended to recognize that not all older "sellers" are luring innocent youth. For example, a 19-year-old college student who supplied two marijuana cigarettes to his 17-year-old roommate would not be subject to a conviction for sale to a minor.

Cases like this are so common that the Uniform Act recommended inclusion of this provision, and many legislatures have accepted the recommendation.

Cultivation

Most jurisdictions punish cultivation or manufacture as heavily as they do sale, because the statutory emphasis is on eliminating supply and distribution.

There are various ways in which cultivation could be punished. The common definition of marijuana included the phrase "whether growing or not." Thus, cultivation would be equivalent to possession if no separate cultivation section were enacted. This is in fact the case in four states, Alaska, Maine, South Dakota, and Texas.

The Uniform Act, however, includes the cultivation of marijuana under "manufacture," which is classified in the same penalty provision with sale.

Of the 54 American jurisdictions, only 15 currently have a more lenient penalty for cultivation than for sale. However, it should be noted that the typical definition of manufacture states "this term does not include the preparation or compounding of a controlled substance by an individual for his own use." Thus it is possible for the manufacture provision of the Uniform Act to be interpreted as prohibiting only cultivation for other than personal use. The question is whether "preparation or compounding" relates directly to cultivation of marijuana.

Despite this ambiguity, however, most states clearly intend to punish cultivation under the manufacture section of the statutes, thus subjecting the offense to the same penalties provided for sale.

Possession

To be convicted of "possession" of a prohibited substance, one must have both knowledge that it is a prohibited substance and "dominion and control" over it. The element of knowledge may be established by an inference supported by sufficient evidence. In some jurisdictions, "constructive" as well as actual physical possession may be sufficient for a conviction. Where no physical possession can be shown, circumstances such as a person's proximity to the marijuana or his property interest in the place where it is found can be used to infer that he possessed the drug at one time. For example, if three persons are riding in an automobile with a bag of marijuana under the back seat, some or all of them may be convicted of constructive possession.

Although the Uniform Act usually does not recommend specific penalties, the Comment to Section 401 does suggest that "simple possession of all drugs, that is possession for personal use as opposed to possession with intent to sell, should be classified as a misdemeanor.[5] This division, based on the possessor's intent, places the burden on the prosecutor to prove intent to sell.

Because many state legislatures feared that potential distributors would escape felony treatment under such an approach, statutory amounts have been used to differentiate penalties according to the amount possessed. Possession of more than the specified amount may set up a rebuttable presumption of intent to sell or may itself be a more serious offense. (However, the Michigan supreme court has ruled this sort of presumption a violation of the Fifth Amendment.) Some states have even legislated multilevel grading, with possession of successively larger quantities subject to increasingly strict penalties.

Most jurisdictions have followed the recommendation of the Uniform Act and have made some forms of possession a misdemeanor. However, possession is always a felony in Nevada and Puerto Rico, while in Kentucky, Maine, and the District of Columbia it is never a felony. Arizona leaves the decision whether to treat possession as a felony within the court's discretion. Of the remaining 48 jurisdictions, 24 have specified an amount above which possession will be considered a felony; in the other 24, the distinction still depends solely on the intent of the possessor.

Of the 24 jurisdictions which use felony amount lines, all but four have retained the offense of "possession with intent" as an alternative sanction against the marijuana dealer. For example, in Idaho possession of less than 3 ounces is a misdemeanor, but possession of more than 3 ounces or possession with intent to sell is a felony. In a few states, a finding of intent to sell has the effect of increasing the penalty for felonious possession of more than the statutory amount; thus, Minnesota's maximum penalty for possession of more than 1-1/2 ounces, normally 3 years, is 5 years if there is intent to sell. Most states, however, use the statutory amount as a substitute for, or a presumption of, intent to sell.

Unfortunately, there is little consensus among jurisdictions as to the amount of marijuana that is necessary to make possession a felony. States have designated amounts as small as 5 grams (Florida) and as large as 1 kilogram (Hawaii). The most popular weight is 1 ounce, chosen by five states, but ten have designated weights greater than 2 ounces.

Statutory amounts are also used in seven states to distinguish between misdemeanors and minor misdemeanors (offenses with a maximum sentence of less than six months). In the states that make this classification, the cutoff points range from 2.5 grams to 1 pound.

Noncriminal Dispositions

Although every state remains committed to a policy of discouraging marijuana use, authorities are increasingly unwilling to subject the casual user of marijuana to the possibility of imprisonment. Accordingly, many states have extended the range of dispositions in such cases beyond imprisonment, suspension of sentence and probation to include specific noncriminal dispositions. The most widely enacted alternative is the Uniform Act's provision for conditional discharge for first offenses of possession. Section 407 provides that:

> Whenever any person who has not previously been convicted of any offense under this Act or under any statute of the United States or of any State relating to narcotic drugs, marihuana, or stimulant, depressant, or hallucinogenic drugs, pleads guilty to or is found guilty of possession of a controlled substance under Section 401(c), the court, without entering a judgment of guilt and with the consent of the accused, may defer further proceedings and place him on probation upon terms and conditions. Upon violation of a term or condition, the court may enter an adjudication of guilt and proceed as otherwise provided. Upon fulfillment of the terms and conditions, the court shall discharge the person and dismiss the proceeding against him. Discharge and dismissal under this Section shall be without adjudication of guilt and is not a conviction for purposes of disqualifications or disabilities imposed by law upon conviction of a crime, including the additional penalties imposed for second or subsequent convictions under Section 408. (There may be only one discharge and dismissal under this Section with respect to any person.)

Some 30 statutes now include some type of discretionary conditional discharge provision. The net result is that a first offense of possession is no longer an unforgivable crime. A judge may place the offender on probation for a certain period of time. If at the conclusion of this time of probation, the offender has not breached the conditions of his probation, the judge can dismiss the charge against him, and there will be no record of conviction.

In addition, 13 of these jurisdictions provide for expungement of all records of the offense, including the arrest record. This means that no first offender who has been granted a conditional discharge will be in any way affected in the future by his single confrontation with the marijuana laws.

There are several variations within the conditional discharge concept. The most frequent provision applies solely to first offense possession, regardless of the age of the offender. A few jurisdictions limit the application of conditional discharge to those under 21 at the time of the offense, while some limit expungement of all records to those under 21, but allow conditional discharge to all first offenders for possession. In addition, a few jurisdictions offer the option of conditional discharge for a first offense of either distribution or possession, although some of them limit the applicability of the provision to cases in which less than a certain amount is possessed or distributed, or require that the distribution be without remuneration.

One state, West Virginia, provides that any first offense of possession or distribution of less than 15 grams shall be disposed of under the conditional discharge section. Having thus made conditional discharge mandatory, West Virginia has come significantly close to decriminalization of possession for personal use and casual distribution.

A growing number of jurisdictions have gone one step further than the Uniform Act, and have made noncriminal dispositions mandatory for the casual user. In eight states (Alaska, California, Colorado, Maine, Minnesota, Ohio, Oregon, and South Dakota), a fine is the only possible penalty for casual use. Most of these states define "casual use" as simple possession of less than a designated amount, varying from 1 ounce to 100 grams (about 3-1/2 ounces). Alaska's provision, however, defines "casual use" as simple possession of any amount, so that only possession with intent to sell is subject to imprisonment.

Although the eight "fine only" statutes agree on the principle of nonincarceration, they differ significantly over whether other incidents of the criminal sanction should be retained. In some of the jurisdictions, cooperative suspects cannot be arrested; instead, they are given citations requiring them to appear in court to pay the fine. In others, traditional arrest, custody, and search procedures remain an option for the police. Record-keeping provisions also vary: in all of the states, except Colorado, destruction or sealing of the casual user's arrest and conviction records may be obtained; however, several states require a 2- or 3-year waiting period.

Analysis of Variations in State Approaches to Consumption-Related Offenses

Today, the majority of jurisdictions make some provision for lenient treatment of consumption-related marijuana offenses; however, reduction in penalties for the least serious offense has not always been accompanied by proportionate reductions for other marijuana offenses. Tables IV-1 through IV-3 provide a breakdown of the 31 jurisdictions that have used amount classifications to create a "least serious" consumer conduct provision. These provisions are displayed together with the current penalties for other possession offenses. Specifically, the jurisdictions are analyzed with respect to (1) the seriousness of penalties for various amounts, (2) the relative harshness of the penalty for possession of greater than the designated amount, and (3) the relative harshness of the penalty for a second offense. In addition, Table IV-3 presents the treatment of second offenses in amount-classification jurisdictions and in jurisdictions that still rely primarily on intent distinctions.

From Table IV-1, it is clear that statutory amounts are clustered in the vicinity of one ounce (28 grams). Although 14 jurisdictions utilize the categories of violation and minor misdemeanor to punish users of less than 25 grams, possession of 100 grams is classified as a major misdemeanor or felony in all but three jurisdictions. Since 100 grams is punishable as a felony in over half of the jurisdictions, it may be inferred that possession of more than that amount is typically regarded as commercial possession.

Table IV-2 indicates the effect of statutory reliance on a single designated amount. Some states have reduced penalties substantially for possession of less than the designated amount while making little or no change in penalties for greater amounts.

TABLE IV-1

PENALTIES FOR POSSESSION OF VARIOUS AMOUNTS OF MARIJUANA (31 JURISDICTIONS)

MAXIMUM PENALTY	AMOUNT POSSESSED (NUMBER OF JURISDICTIONS)			
	25 grams	50 grams	100 grams	200 grams
Violation (usually $100 fine)	8	2	2	1
Minor Misdemeanor (less than 6 months)	6	2	1	2
Misdemeanor (6 months - 1 year)	14	13	11	9
Felony (2 - 15 years)	3	14	17	19

TABLE IV-2

PENALTY STRUCTURE IN 31 JURISDICTIONS FOR "LEAST SERIOUS" AND "NEXT LEAST SERIOUS" POSSESSION OFFENSES

PENALTY FOR LEAST SERIOUS OFFENSE	NUMBER OF JURISDICTIONS	PENALTY BREAKDOWN (NUMBER OF JURISDICTIONS) FOR NEXT LEAST SERIOUS OFFENSE					
		Fine	Misdemeanors		Felonies		
			Minor	Major	<5 yr. max.	5 yr. max.	> 5 yr. max.
Fine	8	1	1	4	1	0	1
Minor Misdemeanor	8	–	–	7	0	1	0
Misdemeanor	15	–	–	–	4	7	4
	31 jurisdictions						

TABLE IV-3

PENALTIES FOR SECOND-OFFENSE POSSESSION OF 25 GRAMS OF MARIJUANA (54 JURISDICTIONS)

PENALTY FOR LEAST SERIOUS OFFENSE	NUMBER OF JURISDICTIONS	PENALTY BREAKDOWN (NUMBER OF JURISDICTIONS) FOR SECOND OFFENSE					
			Misdemeanors		Felonies		
		Fine	Minor	Major	< 5 yr. max.	5 yr. max.	> 5 yr. max.
Jurisdictions with amount classifications (31)							
Fine	8	7	1	–	–	–	–
Minor Misdemeanor	6	–	5	1	–	–	–
Major Misdemeanor	14	–	–	3	8	2	1
Felony	3	–	–	–	1	–	2
Other jurisdictions (23)							
Misdemeanor	19	–	–	8	6	1	4
Felony	4	–	–	–	–	–	4

States that have adopted the unusually lenient "fine-only" provision for small amounts are generally classifying even slightly greater amounts as a major misdemeanor or a felony.

In the case of second offenses, jurisdictions with more lenient first-offense penalties tend not to increase them for second offenses, while those with stricter penalties tend to double them (see Table IV-3). Discretionary conditional discharges are generally not available to second offenders.

Another issue raised by the grading of possession penalties is whether distinctions ought to be made regarding the potency of the drug. Eighteen states (including seven of the eight states with "fine-only" provisions) have drawn such distinctions. In ten of these states, hashish is excluded from coverage by the lowest penalty for possession of marijuana. In the other eight, amounts of hashish are correlated with amounts of marijuana according to ratios that vary from 1/3 to 1/60.

Summary

Table IV-4 provides a state-by-state summarization of relevant marijuana possession, cultivation, and sale penalties.

- Revisions of state marijuana laws in the period 1969-1976 began by emphasizing the reclassification of simple possession as a misdemeanor and later explored noncriminal dispositions of possession of small amounts.

- Sale penalties have been gradually decreasing, but the offense is still a felony in the vast majority of jurisdictions, typically carrying a maximum sentence of five years or more.

- "Accommodation" transfers of marijuana are increasingly punished like simple possession offenses rather than sale offenses.

- Cultivation is usually subject to the same sentence as sale.

- Amount classifications are used in some states to exempt users from criminal dispositions, and in others to ensure that possession of large amounts can be punished as a felony.

TABLE IV-4

SUMMARY OF STATE MARIJUANA LAWS

STATE	TITLE OF ACT	STATUTORY CITATION	REGULATORY CLASSIFICATION	CULTIVATION	SALE			SALE TO MINOR	POSSESSION WITH INTENT TO DISTRIBUTE		POSSESSION		
					Amount	1st Offense	2nd Offense		1st Offense	2nd Offense	Amount	1st Offense	2nd Offense
Alabama	UCSA	22 § 258(47)	Hallucinogen	2-15 yr/$25,000		2-15 yr/$25,000	2-30 yr/$50,000	2-30 yr/$50,000				0-1 yr/$1,000	2-15 yr/$25,000
Alaska		§ 17.12.110	Hallucinogen	No Such Offense		0-25 yr/$20,000	0-life/$25,000	0-life/$25,000			private p.u. or < 1 oz > 1 oz in public	$100 $1,000	----- -----
Arizona	UNDA	§ 36.1002	Narcotic	0-1 yr/$1,000 or 1-10 yr/$50,000		5 yr-life (3)/$50,000	5 yr-life (5, mand.)/$50,000	10 yr-life (5, mand.)/ $50,000	2-10 yr(2)/$50,000	5-15 yr (5, mand.)/ $50,000		0-1 yr/$1,000; or 1-10 yr/$50,000	2-20 yr (mand.)/$50,000
Arkansas	UCSA	§ 82-2617	Marijuana	3-10 yr/$15,000		3-10 yr/$15,000	3-20 yr/$30,000	3-20 yr/$15,000			< 1 oz > 1 oz (p.f.p.i.d.)	0-1 yr/$250 3-10 yr/$15,000	0-2 yr/$500 3-20 yr/$30,000
California	UCSA	Health & Safety Code § 11357	Hallucinogen	1-10 yr(1)	•	5 yr-life (3)/$20,000	5-life (5, mand.)/$20,000	10 yr-life (5)/$20,000	2-10 yr(2)	5-15 yr (3, mand.)	< 1 oz > 1 oz hashish	$100 0-6 mo/$500 0-1 yr/$500 or 1-5 yr	----- ----- -----
Colorado	DDA	§ 12-22-412	Dangerous Drug	1-14 yr/$1,000	•	1-14 yr/$1,000	5-30 yr/$5,000	(> 1 oz) 3-14 yr/$10,000			< 1 oz > 1 oz, or hashish	$100 (public display or consumption: 0-15 days/$100 (mand.)) 0-1 yr/$500	 0-2 yr/$500-$1,000
Connecticut	UCSA	§ 19-480	Hallucinogen	< 1 kg, 0-7 yr/$1,000 > 1 kg, 5-20 yr (mand.)	< 1 kg. > 1 kg.	0-7 yr/$1,000 5-20 yr (mand.)	0-15 yr/$5,000 10-25 yr (mand.)				< 4 oz > 4 oz	0-1 yr/$1,000 0-5 yr/$2,000	0-5 yr/$3,000 0-10 yr/$5,000
Delaware	UCSA	16 § 4752	Hallucinogen	0-10 yr/$1,000-$10,000	•	0-10 yr/$1,000-$10,000	3-15 yr (3, mand.)/ $1,000-$10,000	0-15 yr/(any fine)				0-2 yr/$500	0-7 yr/$500
Florida	UCSA	§ 893.13	Hallucinogen	0-5 yr/$5,000	•	0-5 yr/$5,000	0-10 yr/$5,000	0-15 yr/$10,000			< 5 g > 5 g	0-1 yr/$1,000 0-5 yr/$5,000	0-5 yr/$5,000 0-10 yr/$5,000
Georgia	UCSA	§ 79A-811(j)	Controlled Substance	1-10 yr		1-10 yr	-----	-----			< 1 oz > 1 oz	0-1 yr/$1,000 1-10 yr	----- -----
Hawaii	UCSA	§ 712-1244	Hallucinogen	0-5 yr/$5,000	< 2 oz m > 2 oz m/< 1/8 oz h > 1/8 oz h	0-1 yr/$1,000 0-5 yr/$5,000 0-10 yr/$10,000	----- ----- -----	m 0-5 yr/$5,000 h 0-10 yr/$10,000	No Such Offense		< 1 oz 1 oz-1 kg m, < 1/8 oz h > 1 kg m, 1/8-1 oz h > 1 oz h	0-30 days/$500 0-1 yr/$1,000 0-5 yr/$5,000 0-10 yr/$10,000	----- ----- ----- -----
Idaho	UCSA	§ 37-2732	Hallucinogen	0-5 yr/$15,000		0-5 yr/$15,000	0-10 yr/$30,000	0-10 yr/$15,000			< 3 oz > 3 oz	0-1 yr/$1,000 0-5 yr/$15,000	0-2 yr/$2,000 0-10 yr/$30,000
Illinois	UCSA	56-½ § 701	Hallucinogen	0-1 yr/$1,000	< 2.5 g • 2.5-10 g 10-30 g 30-500 g > 500 g	0-6 mo/$500 0-1 yr/$1,000 1-3 yr(1)/$10,000 1-10 yr(1)/$10,000 1-20 yr(1)/$10,000	----- ----- ----- ----- -----	0-1 yr/$500 0-2 yr/$1,000 1-6 yr/$10,000 1-20 yr/$10,000 1-40 yr/$10,000			< 2.5 g 2.5-10 g 10-30 g 30-500 g > 500 g	0-30 days/$250 0-6 mo/$500 0-1 yr/$1,000 1-3 yr(1)/$10,000 1-10 yr(1)/$10,000	----- ----- 1-3 yr(1)/$10,000 1-10 yr(1)/$10,000 1-10 yr(1)/$10,000
Indiana	UCSA	§ 35-48-4-10	Marijuana	0-1 yr/$5,000 2-4 yr/$10,000	< 30 g m, < 2 g h > 30 g m, > 2 g h	0-1 yr/$5,000 0-1 yr/$5,000 or 2-4 yr/$10,000	0-1 yr/$5,000 or 2-4 yr/$10,000 -----	2-4 yr/$10,000 2-8 yr/$10,000			< 30 g m, < 2 g h > 30 g m, > 2 g h	0-1 yr/$5,000 2-4 yr/$10,000(d)	2-4 yr/$10,000(d) 2-4 yr/$10,000(d)
Iowa	UCSA	§ 204.401	Hallucinogen	0-5 yr/$1,000	•	0-5 yr/$1,000	0-15 yr/$3,000	0-7½ yr/$1,000				0-6 mo/$1,000	0-18 mo/$3,000
Kansas	UCSA	§ 65-4127b	Hallucinogen	0-1 yr/$2,500	•	10 yr (1-3)/$5,000	-----	-----				0-1 yr/$2,500	10 yr(1-3)/$5,000

NOTES:

1. Fines are represented as maximum fines unless two amounts are indicated.
2. When there is "no such offense" under a given category, the penalties are the same as for possession. When the P.I.D. column is blank, penalties are the same as for sale.
3. Unless otherwise indicated, penalties for hashish are the same as for marijuana.

KEY:

UCSA = Uniform Controlled Substances Act
UNDA = Uniform Narcotic Drugs Act
DDA = Dangerous Drugs Act
CDA = 1970 Comprehensive Drug Act
• – There is a lesser penalty for distributing (nonprofit or free) as opposed to commercial sale.
(1) – Minimum of one year to be served before parole.
(mand.) – Sentence/fine must be served/paid.
P.I.D. – Possession with intent to distribute.
p.f. p.i.d. – Amount indicated constitutes a prima facie case (rebuttable presumption) of possession with intent to distribute.
P.u. – Personal use
m – Marijuana
h – Hashish
----- – Same penalty as for the simpler related offense (possession or sale).
(d) – Whether to impose the increased penalty is within the court's discretion.

TABLE IV-4 (Continued)

STATE	TITLE OF ACT	STATUTORY CITATION	REGULATORY CLASSIFICATION	CULTIVATION	SALE			SALE TO MINOR	POSSESSION WITH INTENT TO DISTRIBUTE		POSSESSION		
					Amount	1st Offense	2nd Offense		1st Offense	2nd Offense	Amount	1st Offense	2nd Offense
Kentucky	UCSA	§ 218A.990	Hallucinogen	0-1 yr/$500	*	0-1 yr/$500	1-5 yr/$3,000-$5,000	-----				0-90 days/$250	-----
Louisiana	UCSA	§ 40.966	Hallucinogen	0-10 yr/$15,000		0-10 yr/$15,000	0-20 yr/$30,000	0-20 yr/$30,000				0-6 mo/$500	0-5 yr/$2,000
Maine		17 a § 1106 22 § 2383	Marijuana	No Such Offense	Marijuana *Hashish	0-1 yr/$500 0-5 yr/$1,000	-----	m – 0-5 yr/$1,000 h – 0-10 yr/$1,000			< 1½ oz > 1½ oz (p.f.p.i.d.) hashish	$200 0-1 yr/$500 0-1 yr/$500	-----
Maryland	UCSA	27 § 286	Hallucinogen	0-5 yr/$15,000		0-5 yr/$15,000	0-10 yr/$30,000 *	-----				0-1 yr/$1,000	0-2 yr/$2,000
Massachusetts	UCSA	94C § 32	Hallucinogen	0-2 yr/$5,000		0-2 yr/$5,000	2-5 yr/$10,000	-----				0-6 mo/$500	0-2 yr/$2,000
Michigan	UCSA	§ 335.341	Hallucinogen	0-5 yr/$5,000	*	0-4 yr/$2,000	0-8 yr/$4,000	0-8 yr/$2,000			< 2 oz > 2 oz (p.f.p.i.d.)	0-1 yr/$1,000 0-4 yr/$2,000	0-2 yr/$2,000 0-8 yr/$4,000
Minnesota	UCSA	§ 152.15	Hallucinogen	0-5 yr/$15,000	*	0-5 yr/$15,000	1-10 yr/$30,000	0-10 yr/$15,000			< 1½ oz > 1½ oz, or hashish	$100 0-3 yr/$3,000	0-90 days/$300 0-6 yr/$6,000
Mississippi	UCSA	§ 41-29-139	Hallucinogen	0-10 yr/$15,000	*	0-20 yr/$30,000	0-40 yr/$60,000	0-40 yr/$30,000	0-10 yr/$15,000	0-20 yr/$30,000	< 1 oz > 1 oz, or hashish	0-1 yr/$1,000 0-3 yr/$3,000	0-2 yr/$2,000 0-6 yr/$6,000
Missouri	UCSA	§ 195.200	Hallucinogen	6 mo-1 yr or 0-20 yr	*	5 yr-life	10 yr-life (mand.)		No Such Offense		< 35 g m, < 5 g h > 35 g m, > 5 g h	0-1 yr/$1,000 0-5 yr/$1,000	0-5 yr/$1,000 5 yr-life
Montana	UCSA	§ 54-132	Hallucinogen	1 yr-life		1 yr-life			(hash, or > 1 kg m) 0-20 yr		< 60 g m, < 1 g h > 60 g m, > 1 g h	0-1 yr/$1,000 0-5 yr	0-3 yr/$1,000 -----
Nebraska	UCSA	§ 28-4, 125	Hallucinogen	0-6 mo/$2,000 or 1-5 yr/$2,000		0-6 mo/$2,000 or 1-5 yr/$2,000	0-1 yr/$4,000 or 2-10 yr/$4,000				< 1 lb. > 1 lb.	0-7 days/$500 0-6 mo or 1 yr/$500	0-14 days/$1,000 0-1 yr or 2 yr/$1,000
Nevada	UCSA	§ 453.321	Hallucinogen	1-6 yr/$2,000		1-20 yr/$5,000	life (life, mand.)/$5,000	life(7)/$5,000	No Such Offense		minors < 1 oz minors > 1 oz and adults	0-1 yr/$1,000 1-6 yr/$2,000	1-6 yr/$2,000 1-10 yr/$2,000
New Hampshire	CDA	§ 318-B § 651:2	Controlled Drug	0-15 yr/$2,000		0-15 yr/$2,000	0-15 yr/$2,000	-----	No Such Offense		< 1 lb. > 1 lb.	0-1 yr/$1,000 0-7 yr/$2,000	0-7 yr/$2,000 0-15 yr/$2,000
New Jersey	UCSA	§ 24:21-19	Hallucinogen	0-5 yr/$15,000		0-5 yr/$15,000	0-10 yr/$30,000	0-10 yr/$15,000			< 25 g m, < 5 g h > 25 g m > 5 g h	0-6 mo/$500 0-5 yr/$15,000	----- -----
New Mexico	UCSA	§ 54-11-21	Hallucinogen	10-50 yr/$10,000	marijuana hashish	1-5 yr/$5,000 2-10 yr/$5,000	*2-10 yr/$5,000 10-50 yr/$10,000	m – 2-10 yr/$5,000 h – 10-50 yr/$10,000			< 1 oz 1-8 oz > 8 oz hashish	15 days/$50-$100 0-1 yr/$100-$1,000 1-5 yr/$5,000 30 days-1yr/$500-$1,000	0-1 yr/$100-$1,000 ----- ----- -----
New York	UCSA	Penal Law § 220.06	Hallucinogen	0-1 yr		1-15 yr	6-15 yr (½ of sentence)		0-7 yr	3-7 yr (½ of sentence)	< ¼ oz ¼-1 oz > 1 oz	0-1 yr 0-7 yr (d) 1-15 yr (d)	0-1 yr 3-7 yr (½ of sentence) 6-15 yr (½ of sentence)
North Carolina	UCSA	§ 90-95(b)	Marijuana	0-5 yr/$5,000	*	0-5 yr/$5,000	0-10 yr/$10,000	5-30 yr			< 1 oz m, < 1/10 oz h > 1 oz m, > 1/10 oz h	0-6 mo/$500 0-5 yr/$5,000	0-2 yr/$2,000 0-10 yr/$10,000
North Dakota	UCSA	§ 19-03.1-23	Hallucinogen	0-10 yr/$10,000		0-10 yr/$10,000	0-10 yr/$10,000					0-1 yr/$1,000	-----
Ohio		HB 300 (1975)	Hallucinogen	6 mo-5 yr/$2,500	*< 20 g < 200 g m, < 10 g h 200-600 g m, 10-30 g h > 600 g m, > 30 g h	$100 6 mo-5 yr/$2,500 1-10 yr/$5,000 2-15 yr(6 mo.)/$7,500	0-60 days/$500 1-10 yr/$5,000 2-15 yr/$7,500 2-15 yr(1)/$7,500	6 mo-5 yr (3 mo)/$2,500			< 100 g m, < 5 g h 100-200 g m, 5-10 g h 200-600 g m, 10-30 g h > 600 g m, > 30 g h	$100 0-30 days/$250 6 mo-5 yr/$2,500 1-10 yr/$5,000	----- ----- 1-10 yr/$5,000 2-15 yr/$7,500
Oklahoma	UCSA	63 § 2-401	Hallucinogen	2-10 yr/$5,000		2-10 yr/$5,000	2-20 yr (mand.)/$10,000	2-20 yr/$10,000				0-1 yr	2-10 yr

TABLE IV-4 (Continued)

STATE	TITLE OF ACT	STATUTORY CITATION	REGULATORY CLASSIFICATION	CULTIVATION	SALE			SALE TO MINOR	POSSESSION WITH INTENT TO DISTRIBUTE		POSESSION		
					Amount	1st Offense	2nd Offense		1st Offense	2nd Offense	Amount	1st Offense	2nd Offense
Oregon		§ 167-207	Narcotic	0-10 yr/$2,500		0-10 yr/$2,500		0-20 yr/$2,500			< 1 oz > 1 oz, or hashish	$100 0-10 yr/$2,500	- - - - - - - - - -
Pennsylvania	UCSA	35 § 780-113	Marijuana	0-5 yr/$15,000	•	0-5 yr/$15,000	0-10 yr/$30,000	0-10 yr/any fine auth'd			< 30 g m, < 8 g h > 30 g m, > 8 g h	0-30 days/$500 0-1 yr/$5,000	- - - - - - - - - -
Rhode Island	UCSA	§ 21-28-4.01	Hallucinogen	0-20 yr		0-30 yr/$50,000	0-60yr/$100,000	0-60 yr/$50,000				0-1 yr/$500	0-2 yr/$1,000
South Carolina	UCSA	§ 32-1510.49	Hallucinogen	0-5 yr/$5,000	•	0-5 yr/$5,000	0-10 yr/$10,000	0-10 yr/$10,000			< 1 oz m, < 10 g h > 1 oz m, > 10 g h	0-3 mo/$100 0-6 mo/$1,000	0-6 mo/$200 0-1 yr/$2,000
South Dakota	UCSA	§ 42-6, ch. 158, SL 1976	Hallucinogen	No Such Offense	< 1 oz* 1 oz-1 lb > 1 lb hashish	0-1 yr/$1,000 0-2 yr/$2,000 0-5 yr/$5,000 0-10 yr/$10,000		- - - - -	No Such Offense		< 1 oz 1 oz-1 lb. > 1 lb. or hashish	$20 0-1 yr/$1,000 0-2yr/$2,000	- - - - - - - - - - - - - - -
Tennessee	UCSA	§ 52-1432	Marijuana	1-5 yr/$3,000	< ½ oz* > ½ oz	0-1 yr/$1,000 1-5 yr/$3,000	1-2 yr 0-10 yr/$6,000	1-10 yr/$6,000				0-1 yr/$1,000	1-2 yr
Texas	UCSA	Art. 4476-15, § 4.05	Hallucinogen	No Such Offense	•	2-10/$5.000	2-20/$10,000	- - - - -	No Such Offense		< 2 oz > 2 oz > 4 oz, or hashish	0-180 days/$1,000 0-1 yr/$2,000 2-10 yr/$5,000	30-180 days/$1,000 90 days-1 yr/$2,000 2-20 yr/$10,000
Utah	UCSA	§ 58-37-8	Hallucinogen	0-5 yr/$5,000	•	0-5 yr/$5,000	- - - - -	0-10 yr/$5,000				0-6 mo/$299	0-1 yr/$1,000
Vermont	No Name	18 § 4224	Regulated Drug	0-5 yr/$10,000	•	0-5 yr/$10,000	0-25 yr/$25,000	- - - - -	0-3 yr/$3,000		< ½ oz ½-2 oz > 2 oz	0-6 mo/$500 0-3 yr/$3,000 0-5 yr/$5,000	0-2 yr/$2,000 - - - - -
Virginia	UCSA	§ 18.2-248 § 54-524.101:1	Hallucinogen	5-40 yr/$25,000	•	5-40 yr/$25,000	- - - - -	10-50 yr/$50,000				0-1 yr/$1,000	- - - - -
Washington	UCSA	§ 69.50.401(a)	Hallucinogen	0-5 yr/$10,000		0-5 yr/$10,000	0-10 yr/$20,000	0-10 yr/$10,000			< 40 g > 40 g	0-90 days/$250 0-5 yr/$10,000	- - - - - 0-10 yr/$10,000
West Virginia	UCSA	§ 60A-4-401(a)	Hallucinogen	1-5 yr/$15,000	•	1-5 yr/$15,000	1-10 yr/$15,000	1-10 yr/$50,000				3-6 mo/$1,000	3-12 mo/$2,000
Wisconsin	UCSA	§ 161.41(1) (b)	Hallucinogen	0-5 yr/$15,000		0-5 yr/$15,000	0-10 yr/$30,000	0-10 yr/$15,000	0-5 yr/$15,000	0-10 yr/$30,000		0-1 yr/$250	0-2 yr/$500
Wyoming	UCSA	§ 35-347.31	Hallucinogen	0-6 mo/$1,000		0-10 yr/$10,000	0-20 yr/$20,000	0-20 yr/$10,000				0-6 mo/$1,000	- - - - -
District of Columbia	UNDA	§ 33-401 et seq.	Narcotic	0-1 yr/$100-$1,000		0-1 yr/$100-$1,000	0-10 yr/$500-$5,000	- - - - -				0-1 yr/$100-$1,000	0-10 yr/$500-$5,000
Guam	UCSA	§ 626.10 *	Hallucinogen	0-5 yr/$5,000		0-5 yr/$5,000	0-10 yr/$10,000	0-10 yr/$5,000				0-3 mo/$500	0-6 mo/$1,000
Puerto Rico	UCSA	§ 24-2401	Hallucinogen	5-20 yr/$20,000		5-20 yr/$20,000	10-40 yr/$30,000	10-40 yr/$40,000				1-5 yr/$5,000	2-10 yr/$10,000
Virgin Islands	UCSA	19 § 604	Hallucinogen	0-5 yr/$5,000	•	0-5 yr/$15,000	0-10 yr/$30,000	0-10 yr/$30,000				0-1 yr/$5,000	0-2 yr/$10,000

- Discretionary conditional discharge is still the most widely legislated noncriminal disposition; however, eight states have enacted mandatory fine-only provisions covering possession of small amounts.

- Expungement (or the equivalent) of arrest and conviction records is now possible in 20 states for certain categories of marijuana users.

- Marijuana and hashish are treated differently in 18 states, either through parallel amount classifications or through noncriminal disposition provisions covering marijuana only.

- Recent revisions involving significant penalty reductions have affected first offenders and users of less than one ounce.

RECORD CONSEQUENCES OF ARREST AND CONVICTION FOR MISDEMEANOR MARIJUANA OFFENSES

Apart from the reduction in maximum penalties for marijuana possession offenses described in the previous section, another important pattern of recent legislation involves the amelioration of the "record consequences" of arrest for, or conviction of, minor criminal offenses. This section will describe these remedial measures as they apply to arrests for consumption-related marijuana offenses. To give a complete account of the current "state of the law," it will be necessary to draw on three types of statutory reforms. First, there are general record expungement and sealing provisions which, since they apply generally to criminal (usually misdemeanor) behavior in general, will mollify the record consequences of any misdemeanor marijuana arrest.[6] Second, the Uniform Controlled Substances Act that has been adopted by 31 of the 53 United States jurisdictions employs the device of "conditional discharge," which under certain circumstances frees the arrestee from record consequences by removing the criminal label from the conduct. Finally, eight states have recently passed legislation "decriminalizing" consumption-related marijuana possession.

General Criminal Record Reforms

Before proceeding to a discussion of the general provisions, a few definitions are in order. The following definitions are used in this section:

- "Expunging" and "purging" shall mean the complete destruction of all arrest or conviction information for all purposes.
- "Sealing" refers to placing extraordinary restrictions on the dissemination of records and may involve physical separation from general files without preventing their use for all purposes. Thus the sealing statutes typically permit both police and prosecutors to use sealed records for certain specified purposes; for instance, several statutes allow access to sealed files for the purpose of determining if the defendant had been arrested or convicted of a crime in the past.
- "Removal" of records refers to both purging and sealing.
- "Right to state the nonexistence of a record" refers to the ability to state the absence of a criminal history in response to public or private employment inquiries.[7]
- "Disposition favorable to the accused" means any outcome of an arrest other than an adjudication of guilt, including acquittal, dismissal, and failure to prosecute.
- "Final disposition" refers to completion of any requirements demanded of the convicted person as a condition of obtaining his total freedom from supervision within the criminal justice system. Thus a final disposition has not been reached with respect to the particular offense unless the convicted person has served his sentence, paid his fine, and satisfied parole or probation requirements.
- "Mandatory" removal provision is one which the court must order if the statutory conditions are met.

- "Discretionary" provision is one which will not offer relief unless the statutory conditions are met and the court chooses to seal or purge.

- "Self-executing" remedial measure is one which takes effect without any action of the arrestee or convict.

Conviction Records

From the offender's point of view the most salutary reform would be mandatory expungement of conviction information, which is effected immediately upon the final disposition of the case without any action upon the offender's part. No state currently has such a provision.[8] In fact only one state, New Jersey, permits expungement of conviction records at all.[9] Purging is not mandatory; it is discretionary with the court. In addition, it is not self-executing; the offender must petition for expungement. Further restricting the scope of this provision is the fact that purging is authorized only where the sentence at the trial had been suspended or where the fine was less than $1,000. Even then the remedy is not available immediately; the convicted person must wait for 10 years after his conviction to file for expungement and during that time he must not have been convicted of any subsequent crimes.

Five states have statutes providing for sealing of conviction information;[10] however, sealing is mandatory in only Alaska and Massachusetts and self-executing in only Alaska. In all five states, there is a waiting period following final disposition of the conviction, varying in length from one year to ten, during which time the convicted person must have been convicted of no additional crimes in order to be eligible for sealing. In Ohio and Oregon, sealing is available only to first offenders. In the other three states, there is no such restriction.

In addition to the five states that provide for sealing expressly by statute, California's Department of Justice has proposed a regulation whereby records of misdemeanor convictions are retained for 7 years. No explicit statutory authority for such action has been located. Finally, the District of Columbia[11] and Arizona[12] have statutory provisions granting administrators discretion to remove obsolete records from their files. (It is not known obviously whether record sealing regulations have been issued pursuant to this authority.)

Arrest Records

Sixteen states have statutes for expungement or sealing of arrest records, where the arrest does not lead to a conviction.[13] (Again it is not known whether the District of Columbia and Arizona[14] have adopted procedures for removing arrest records from active files, pursuant to the statutory authority vested in administrative officials to remove or destroy obsolete records.) California's Department of Justice has proposed a record retention policy in the case of arrests without conviction, whereby arrest records are retained for a period of 5 years following arrest.

The provisions of the 16 statutes manifest greater solicitude toward arrestees who receive a favorable disposition than toward those who are ultimately convicted. For instance, while only New Jersey provides for expungement of conviction records, the vast majority of the states providing for removal of arrest records have chosen expungement rather than sealing.[15] Other indications that greater relief is afforded to the arrestee than to the convict are seen in the facts that virtually all of these states provide for immediate removal of the information[16] and that five of them are self-executing.[17] Furthermore, the provisions in all but two states are mandatory.[18] Seven of the 16 states limit the relief to persons with no prior conviction record.[19]

Surprisingly three of the states which permit sealing of conviction records have no provision for removal of arrest records.[20] Thus, unless a court reads into the conviction sealing statute an intention of the legislature to permit sealing of arrest records as well, those states have taken the rather anomalous position of removing the record consequences for one who is convicted while retaining the same consequences for one who is acquitted.

"No Record" Responses

One of the most serious record consequences which attends either an arrest or a conviction record is the inability to state truthfully the nonexistence of a criminal record. As a practical matter, it may well be that sealing or expunging a record by itself solves this problem. That is, if the employer can never gain access to the criminal record, then the potential employee may deny with impunity the existence of that record. However, nine states have enacted provisions designed to resolve the dilemma of the arrestee who must either lie or be denied employment.[21] The most common remedy is simply to grant a statutory privilege to answer "no record" with respect to records which have been sealed or purged.[22]

There are two major drawbacks to this solution. First, the arrestee or convict may not know of the existence of the right to answer "no record." Second, since the no record provision is tied to the sealing or purging statute, the no record provision is subject to the limitations of that statute. For example, where a conviction record cannot be sealed for a given period of time after final disposition in the case, the convict is unable to take advantage of the no record provision in the period immediately following his release--and the convict's need to secure a job during this period is most imperative.

Massachusetts has solved the problem of ignorance of the right by mandating that the employer who inquires about prior record also inform the potential employee that he may answer in the negative if that record has been sealed. As to the second drawback, Maine and Washington alleviate this by the simple expedient of divorcing the no record and removal provisions. However, in solving this problem, these two states created others. The Maine legislature enacted a statutory prohibition against an employer utilizing an arrest record to the disadvantage of any applicant for employment. The basic deficiency with this provision is that the legislature has provided neither a remedy for its violation nor the means to enforce the provision. Beyond this there is no ability of the arrestee to answer "no record;" moreover, the convicted person receives no relief at all from this provision. Washington's statute, which also addresses the employer, proscribes any unfair employment inquiries, and includes an inquiry relating to arrests resulting in a favorable disposition in its list of unfair employment inquiries. Again there is neither remedy for violation nor means of enforcement. However, there is relief for a convicted offender in that the list of unfair employment inquiries includes questions relating to both convictions which bear no reasonable relation to the position sought and convictions which reached final disposition more than 7 years prior to the time when employment is being sought.

Conditional Discharge in Drug Cases

The second device for removing the record consequences of consumption-related marijuana offenses is the conditional discharge provision of the Uniform Controlled Substances Act, adopted in 31 of the 53 United States jurisdictions.[23] This provision permits the sentencing judge, after an adjudication or admission of guilt of possession of marijuana (or other controlled substances), to place the offender on probation in lieu of entering a judgment of guilt. Upon fulfillment of all the terms and conditions of probation, the defendant is discharged.[24] Such discharge is not deemed a conviction for the purpose of disqualifications or disabilities imposed by law upon conviction of a crime. The conditional discharge option is completely discretionary with the sentencing judge. However, conditional discharge may not be utilized in three instances: (1) where the offense is sale of marijuana (or possession with intent to sell), (2) where the person has previously been convicted of a drug-related offense, and (3) where the person has previously received a conditional discharge under the same provision.

A number of states have expanded the remedial effects of conditional discharge. Thus in four states the provision encompasses sale as well as possession.[25] In Massachusetts the provision is mandatory; that is, the judge must offer the accused the option of conditional discharge. The ability to state the nonexistence of a record after conditional discharge is expressly provided for in Florida, Maryland, Minnesota, Oklahoma, and West Virginia. In addition, several jurisdictions have provisions--some mandatory and some discretionary--for total expungement of all records relating to the conditional discharge.[26] A significant number of other states permit expungement only in the case of minors.[27]

In modifying the provisions of the Uniform Act, some legislatures have acted to contract, rather than expand, the remedy. Oklahoma reverses the Uniform Act's position on use of the conditional discharge in subsequent convictions in providing that the conditional discharge is to be deemed a conviction for the purpose of imposing additional penalties for a subsequent offense. Two states, Ohio and Idaho, restrict the use of the conditional discharge option to cases involving amounts below a stated amount; in the former the amount is 100 grams, while in the latter the amount is 3 ounces.[28]

Recent Marijuana Law Revisions

The most direct method of removing the record consequences of consumption-related marijuana behavior is to withhold the criminal label in the first instance. If this were done, the offender would not have to apply for expungement or sealing, nor would he have to fear the question "Have you ever been arrested or convicted of a crime?" Eight states have recently "decriminalized" the possession of small amounts of marijuana by adopting fine-only punishment provisions.[29] However, only South Dakota, Maine, Oregon, and Alaska have removed the criminal label, thereby extirpating record consequences at the source. Ohio, while retaining the criminal label, specified that arrest or conviction does not constitute a criminal record, and the arrestee may deny the existence of a record. Minnesota and California provide for mandatory expungement after 2 years. However, during this interim period the arrestee is subject to all of the record consequences described above. The Colorado legislature provided no specific remedy for problems caused by the existence of a marijuana arrest record in its decriminalization bill; moreover, Colorado has not enacted either the conditional discharge provision of the Uniform Act or any general expungement provisions described above. Thus Colorado, while limiting the formal penalty for possession of 1 ounce or less of marijuana to fines of not more than $100, has left intact the system of social and economic punishments.

Summary

In summary, legislative reforms of the last few years have brought significant relief to those arrested and convicted of minor marijuana offenses, in terms of reducing the force of the record consequences. Four states have removed the criminal label entirely as to possession; 29 jurisdictions permit conditional discharge of the person charged with possession; 21 states have some provision for removal of arrest or conviction records; and in 13 jurisdictions, there is an ability under certain circumstances to deny the existence of a record. To say that the first step has been taken, however, does not mean that having a record is no longer a problem. Eight states have taken no action to reduce the record consequences of arrest and conviction for consumption-related marijuana behavior.[30] More importantly, of the states which do offer some form of relief, only four--those which have removed the criminal label--permit the person convicted of possession to truthfully state "no record" in employment inquiries made immediately after the conviction. Thus, while most states have acted to ameliorate the record consequences of consumption-related marijuana offenses, the vast majority have still not resolved the dilemma which the recently convicted person faces when applying for employment. And this may be the most serious problem confronting the person with a record--especially when his only offenses are minor violations of marijuana prohibitions.

CONSTITUTIONAL DIMENSIONS OF MARIJUANA CONTROLS

For 50 years, legislative authority to regulate, prohibit, and punish the distribution and use of marijuana was supported by a popular consensus tying the drug to the "narcotics" and was generally unhampered by judicially articulated constitutional restraints. But in recent years, the "narcotics consensus"--as applied to marijuana use--has evaporated. Reformers have emphasized the relative innocuousness of marijuana use with alcohol and with tobacco use, compared with the dangers associated with so-called "hard" drugs such as heroin. The previous sections have traced the reformers' efforts in the state legislatures; this section traces their activities in the courts and summarizes the current state of the law.

The Legitimacy of Prohibiting Distribution of Marijuana

Legislatures have chosen to prohibit, rather than merely regulate, the distribution of marijuana for nonmedical purposes. The constitutionality of this legislation, however, has been challenged on the basis that it denies equal protection and due process. The challenges have been consistently rejected, and one may extract the principle that prohibition of the distribution of marijuana is a legitimate exercise of the police power and in no way violates any constitutional rights of the distributors or the potential consumers.

The Equal Protection Argument

Advocates have asserted that it is irrational to prohibit the distribution of marijuana while allowing the distribution of alcohol and tobacco. The claim depends on a judicial finding that marijuana is at least no more harmful than the other substances and on a conclusion that differences in equal controls are irrational and therefore deny equal protection of the laws. A corollary of this argument is that, even acknowledging the state's power to control distribution of marijuana, that power must be exercised only to regulate and not to prohibit, since traffic in alcohol and tobacco is regulated and not prohibited.

The courts have routinely rejected these arguments. One court simply noted that all 50 states and the federal legislature prohibit distribution, and the court was unwilling to say that all of those legislatures had exceeded their power.[31] Other courts have refused to view the distinction between marijuana and alcohol or tobacco as

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being wholly irrational on empirical grounds, These courts have noted that the scientific community is divided on the question of whether marijuana is harmful; this division is not enough to overcome the presumed constitutionality and rationality of a legislative judgment that the substance is, indeed, harmful. More importantly, the courts have held that even if alcohol and tobacco are as harmful as marijuana, the legislature is under no obligation to "cover the waterfront"--under this view, different treatment of different substances is a legislative prerogative.[32]

The federal judiciary has taken a similar posture. Congress, like the state legislatures, is not compelled to take an all-or-nothing approach to the regulation of harmful substances. Granting even that marijuana is *less* harmful than tobacco or alcohol does not imply that Congress, to act consistently with constitutional principles of equal protection, must treat distribution of all of these substances in the same manner.[33]

The Due Process-Privacy Argument

Litigants have also claimed, with a similar lack of success, that the due process clause protects distribution of marijuana (and other drugs) from state prohibition. This argument seems to depend on the notion that substantive due process includes a right to privacy, which in turn encompasses the right to *distribute* marijuana.

In addressing this argument, the courts have distinguished sharply between the distribution and possession of marijuana. Acknowledging for the sake of argument that values of privacy may protect possessory conduct, some courts have concluded that the "right" does not encompass distribution; in the words of one court, "privacy remains unimpaired whether or not (the appellant) is able to secure possession."[34] Other courts have rejected a similar claim for different reasons. The Fifth Circuit, in a case involving the distribution of hashish, noted that there was no fundamental right to sell marijuana or hashish, and then decided that Supreme Court cases dealing with privacy[35] were irrelevant because "neither involved the element of commercialization present in the crime of possession with intent to distribute and actual sale."[36] The Hawaiian Supreme Court, when asked to hold the state to a "substantial burden of justification" for legislation prohibiting distribution of marijuana because a fundamental right of privacy was involved, rejected the request and upheld the legislation on so-called minimum rationality grounds.[37] Finally, the Alaska Supreme Court, which had earlier held that the right to privacy embraced the possession of marijuana in the home for personal use,[38] held that right did not extend to distribution in a public place.[39]

In sum, courts have thus far been unwilling to hold that an individual's constitutional right of privacy entitles him to engage unhampered in the distribution of marijuana. To the contrary, the state may, consistent with constitutional values, prohibit the distribution of harmful substances.

Constitutional Limits on Penalties for Distribution-Related Offenses

Even if the state may legitimately prohibit and penalize commercial cultivation and distribution of marijuana, there are clearly constitutional limits on the type and severity of sanctions that may be imposed on violators. The constitutional restrictions derive from overlapping concepts of proportionality and equality. In other words, the legislature must select its sanction for any given offense with at least some regard for the sanctions it selects for more or less "serious" offenses.

The Eighth Amendment: Excessive Punishments

A claim increasingly heard is that penalties imposed for marijuana-related distribution offenses violate the Eighth Amendment prohibition against cruel and unusual punishments. Often these claims challenge the penalty statute as applied. The statute is assumed to be facially constitutional, but the argument is that the sentence given this particular defendant is excessive. Most courts have been unsympathetic, stating the traditional view that sentencing lies within the discretion of the trial judge, and that as long as the sentence falls within constitutionally permissible statutory limits, there has been no abuse of discretion.[40] However, the New Jersey courts have taken a different view. The Court in State v. Brennan[41] said that incarceration was too harsh a penalty for those persons convicted of selling marijuana where circumstances suggested that the defendant was a candidate for rehabilitation. The court remanded the case with the suggestion that probation would be an appropriate disposition. This decision, while allowing the sentencing statute to stand as written, made full effectuation of the statute impossible.

The core constitutional challenge, however, is lodged against the constitutionality of the penalty statutes as written. Litigants contend that the penalties prescribed by the legislature (and imposed by the court) constitute cruel and unusual punishment because they are "excessive" in relation to the relative seriousness of the offense. In the last several years, the courts have articulated a general "proportionality" doctrine in connection with legislative penalty decisions, and several courts have struck down penalties for marijuana distribution offenses under this doctrine.

In *People* v. *Lorentzen*,[42] the issue was whether a statute providing a mandatory minimum of 20 years imprisonment for the sale of marijuana violated the U.S. and Michigan constitutional prohibitions against "cruel and unusual" (U.S.) and "cruel or unusual" (Michigan) punishments. The court's inquiry turned "not only upon the facts, circumstances, and kind of punishment itself, *but upon the nature of the act which is to be punished*."[43] The test is whether the prescribed minimum punishment "is in excess of any that would be suitable to fit the crime . . . an *excessive* sentence (is) one that is cruel or unusual."[44]

The court utilized three standards. It compared the minimum mandatory sentence of 20 years for the offense at issue with maximum sentences for other offenses of similar magnitude in the jurisdiction and found the sentence excessive by that standard.[45] It compared the 20-year minimum with sentences given in other jurisdictions for the same offense (the "evolving standards of decency" test) and found Michigan's sentence excessive. Finally, the court examined Michigan's sentence in light of the penal goal of rehabilitation and found that the minimum sentence ignored that goal altogether: the mandatory minimum "does not allow consideration of the *individual* defendant."[46] Having applied each of the three tests, and finding the legislation deficient under each, the court struck down the statute as violative of the federal and state constitutions.

The Sixth Circuit acted in a similar manner in the case of *Downey* v. *Perini*.[47] The appellant had been convicted of both the sale and possession of marijuana, and had been sentenced to 20-40 years for the former and 10-20 years for the latter, the statutory minimum and maximum in each case. The court declared that length of sentence alone, if disproportionate to the gravity of the offense, could render a statute constitutionally defective. Using essentially the test used in *Lorentzen*, and relying heavily on the opinion of Justice Brennan in *Furman* v. *Georgia*,[48] the court found that the statutory minimum terms were irrational. This irrationality was exacerbated when an examination of Ohio statutes revealed that the minimum sentences for other very serious offenses were much lower.

It is interesting to note that the courts in other jurisdictions have accepted the basic proportionality doctrine but have upheld severe sentences for other drug offenses, especially heroin sale offenses. For example, the New York Supreme Court, Appellate Division, has upheld the state's indeterminate sentencing provisions[49] and the imposition of mandatory life sentences for certain drug sale defendants.[50] In each case, the court upheld the legislative scheme as rational, given the nature of the drug problem faced by New York and the failure of less stringent measures.[51]

Similarly, in *In re Jones* the California judiciary rejected the claim that an indeterminate sentence with a maximum of life imprisonment was cruel and unusual punishment when applied to the sale of marijuana.[52] The court said the test was one of "proportionality"--in other words, whether the sentence was disproportionate to the seriousness of the conduct punished. Under this test, the California court considered the nature of the offense and the offender, with particular regard to the degree of danger presented to society; compared the penalty with the penalties for similar offenses within California; and compared the penalty at issue with penalties used by other jurisdictions to punish the same offense.

However, though the California court has upheld statutory maximums, under indefinite sentencing systems, the same court has held that *mandatory* long-term confinement without the possibility of parole is cruel and unusual punishment. For example, the court has held that denying consideration for parole for 10 years for a person convicted of distributing heroin with two prior convictions violated the Eighth Amendment.[53] The court applied the test used in *Lorentzen* in reaching this decision. Also very evident was a concern that the statute as written did not allow for the consideration of mitigating circumstances when that would be appropriate.

The court acted in a similar fashion in ordering the minimum time for parole eligibility in cases involving the distribution of amphetamines reduced from 3 years to 20 months, the latter time being the period set for similar offenses.[54] The opinion emphasized that sentencing must focus on the individual offender; the parole board could keep the more dangerous incarcerated if need be. (However, the same court rejected a plea that imprisonment for a minimum 10-year period preceding parole consideration was cruel and unusual punishment in the case of those convicted of distributing heroin for minors. Since such defendants demonstrated their greater dangerousness by their conduct, the long period necessary for parole eligibility was justified.)[55]

This series of cases indicates that the same penalties for marijuana sale that were under discussion in the Jones case might not survive a similar attack today. These trends suggest that courts are more willing to review legislative sentencing choices for drug offenses, especially if the sentence is mandatory and especially in marijuana cases. These cases suggest ultimately that only very low mandatory minimum sentences will survive constitutional scrutiny, and that terms of incarceration in a given case which exceed 10 years are constitutionally suspect.

Classification for Penalty Purposes

Even if the sentences prescribed for marijuana distribution offenses are not unconstitutional by some absolute scale of disproportionality, they may be unconstitutional because they are derived from an unconstitutional classification. Thus, there is support for the proposition that classifying marijuana as a "narcotic" for penalty purposes is a denial of equal protection. Under this reasoning marijuana is not, scientifically speaking, a "narcotic," since it does not have stupefying effects and is not addictive; nor is it as harmful as narcotics. Thus to classify it as a narcotic for penalty purposes, thereby penalizing distribution of marijuana as severely as distribution of heroin, creates an irrational classification. To persist in this classification after it has been undermined empirically, is to deny those who commit marijuana-related offenses equal protection of the laws.

Although the question has been largely mooted by legislative acceptance of the Uniform Controlled Substances Act that reclassified marijuana as an hallucinogen and imposed less severe penalties for its use and distribution than for "narcotic" offenses, some courts have struck down these anachronistic classifications when they have been tied to criminal penalties. People v. McCabe[56] marks the most successful challenge to the rationality of classification of marijuana as a narcotic. The court said the issue was "whether any rational basis exists to justify the substantially greater penalty for a first conviction for the sale of marijuana" than for a first sale of a drug classed as a depressant or stimulant.[57] The Court concluded that available scientific data provided no rational basis for classification of marijuana as a narcotic. Consequently there was no rational basis for treating first convictions for sales of marijuana and first convictions for sale of drugs classed as stimulants or depressants similarly for penalty purposes. Because there was no rational basis for the classification, it denied equal protection.[58] Similarly, the court in People v. Sinclair[59] compared the effects of marijuana with the effects of the hard drugs (narcotics) with which it was classified and concluded that there was no rational basis for the classification.

Many courts have rejected similar challenges either because the medical data about the effects of marijuana remain in dispute and the courts must defer to presumed legislative findings[60] or because the legislature, given broad powers of definition, may label a drug (either marijuana or, often, cocaine) a "narcotic," even though scientists would not do so.[61] The real issue, however, is not whether marijuana may be called a "narcotic" and classified together with heroin (in Schedule I) for regulatory purposes; instead it is whether marijuana distribution offenses may be penalized as severely as heroin distribution offenses, whether or not marijuana is called a narcotic.

It is noteworthy, from this perspective, that the federal courts have upheld the 1970 Comprehensive Drug Act against equal protection challenges attacking the "Schedule I" classification only because Congress had written separate and less severe penalty provisions for marijuana--the Schedule I classification was only for regulatory and not punitive purposes.[62] It is also noteworthy that while the heroin/marijuana "narcotic" classification has been mooted by recent reforms, marijuana frequently is classified together with amphetamines, barbiturates, and other "dangerous drugs" for penalty purposes. Predictably the argument is now being made that classification of marijuana with amphetamines and barbiturates for penalty purposes denies equal protection of the laws for much the same reasons as the argument was made in the context of narcotics.[63] The claim was rejected in an early case, but was successful in the latest effort, and the court held that the legislature could not classify marijuana with the drugs in question.[64] The court compared the effects of marijuana on the user and on the public with those of amphetamines and barbiturates and found that to classify these substances together was wholly irrational.

The Legitimacy of Prohibiting the Possession of Marijuana

While courts have regularly upheld state power to regulate or even prohibit the distribution of marijuana, attacks on legislation prohibiting possession for personal use have met with some success.[65] Appellants generally base their claims on the right of privacy, either as found in the due process clause or as a separate, fundamental constitutional right. (They also argue that the state violates the equal protection clause when it prohibits consumption of marijuana while permitting the use of alcohol and tobacco, but this argument has met with no success and merits little discussion. The maxim that legislatures do not have to control the use of all harmful substances in the same way carries the day whether the litigants are attacking the prohibitions against sale or against possession.)[66]

Due Process/Privacy

A successful attack on these statutes depends on the ability of the challenger to convince the court to apply "strict scrutiny," a test traditionally involved only when a fundamental right is at issue and which requires the state to justify the legislation as being necessary or otherwise substantially related to a "compelling" state interest. Unless such a fundamental "right" is involved, the court will apply what is called "minimum rationality" review, which in this context requires the state to show only that the prohibition of possession of marijuana is rationally related to a legitimate state end. Under this level of review, the courts have had no difficulty upholding the legislation, especially in light of the continuing medical uncertainties over the effects of its use.[67]

It is clear that courts demand more justification by the state when a statute allegedly intrudes on the "right of privacy." The interests embraced by the constitutional concept of privacy are generally labeled as fundamental rights, and only a compelling state interest will justify interference with exercise of those rights.[68] The question in marijuana-related litigation is not whether the use of marijuana is itself a fundamental right, but whether the constitutionally protected privacy right encompasses the right to personal possession and use of marijuana.[69]

Federal courts on occasion have conceded, for the sake of argument, that privacy may encompass the right to personal possession of marijuana.[70] Individual state supreme court justices, in concurrence and in dissent, have in effect found privacy to be a separate, fundamental right equivalent to a right to use one's body as one pleases absent an impact on public health; that right would include the use of marijuana.[71] However, no court has yet held that prohibitions of marijuana possession violate an independent, fundamental right of privacy. Reasons for rejection vary. Courts sometimes cite the footnote in *Stanley* v. *Georgia* where the Supreme Court disclaimed any intention to limit state regulation of narcotics.[72]

Other courts have concluded that there is no independent right of privacy at all, that only fundamental rights raise privacy interests to constitutional levels, and that the use of marijuana is not one of those fundamental rights.[73]

A recent decision by the Hawaiian Supreme Court is illustrative. In State v. Baker,[74] the lower court had accepted the defendants' contention that the state's interest in proscribing the personal use of marijuana was patently de minimis and did not warrant the application of the penal sanction. In other words, appellants did not claim that the use of marijuana was a fundamental right; rather, the appellants saw it as conduct so inoffensive that the state's police power could not reach it, at least through criminal sanctions. The Hawaiian Supreme Court reversed, noting initially that statutes prohibiting use of harmful substances were presumptively constitutional, that evidence that marijuana was not harmful was unpersuasive, and that commercial distribution of marijuana could be proscribed.[75]

The opinion then turned to the issue of possession. In the court's view, the challengers "begin with the wrong end of the stick"[76] when they asserted that a person had a fundamental right to conduct oneself as he or she pleased absent harm to others. Neither the state constitutional provision on privacy nor federal or state decisions on the subject elevated privacy to the equivalent of a First Amendment right. Since the First Amendment was not involved, the state was held only to the minimum rationality test, a test easily passed. The opinion then reached the pertinent holding: the commercial distribution of harmful substances "may sweep within its ambit, as an enforcement measure, the possession of the substance for personal use."[77] Finally, the Supreme Court's privacy decisions on contraception and abortion were distinguished on the ground that they dealt with questions of lifestyle while the case at bar dealt with the prevention of harm.

The reluctance of courts to establish privacy as an independent, fundamental right is not restricted to marijuana cases. For example, courts have taken the same attitude in the so-called "lifestyle" and personal appearance cases. In cases attacking school dress and hair codes, virtually all courts have refused to articulate a concept of personal autonomy as found in a constitutional value of privacy.[78] The courts which have overturned these codes, have usually done so through either the due process or liberty clauses of the 14th Amendment, denying often in explicit terms that a constitutional right to privacy is involved.[79] The right to personal appearance is deemed nonfundamental, and a minimum rationality test is applied. However, the courts find that the states are unable to meet even this test in this context.

This reluctance to involve the right to privacy, with the higher burden of justification it places on the state, seems grounded in a reluctance to extend the protection of privacy beyond those activities associated with family life and relationships absent Supreme Court guidance. Though the case of Stanley v. Georgia, upholding the right of the individual to view pornography in the privacy of his home, could have been utilized to forge a concept of privacy tied to personal choice and location, the courts have chosen to ignore this possibility, either citing the Stanley note dealing with narcotics (discussed above) or distinguishing it by finding it applicable only to fundamental rights, a category not encompassing use of marijuana or hair length.

Ravin v. State

Privacy arguments have generally foundered because courts have not been convinced they should apply strict scrutiny to state legislation prohibiting the personal use of marijuana. The use of marijuana does not qualify as a fundamental right, and those courts which recognized privacy as an independent concept have not been persuaded that the use of marijuana implicates one of the constitutionally significant values. States have easily met the otherwise applicable minimum rationality test.

In 1975, the Supreme Court of Alaska broke new ground. In the case of Ravin v. State,[80] the court held that possession of marijuana by adults for personal use in the home was constitutionally protected.

Ravin, a lawyer, had been arrested in his automobile and charged with possession of marijuana. On appeal, he argued that the fundamental right of privacy under the federal and Alaska constitutions was broad enough to encompass and protect the possession of marijuana for personal use. Since privacy was a fundamental right, the state would have to show a compelling interest to justify its decision to outlaw possession and use of marijuana. Ravin argued that the state could not meet this burden.

The court initially expressed its dissatisfaction with what it terms the "rigid two-tier formulation" of the fundamental right/compelling state interest and nonfundamental right/rational basis approach to constitutional litigation. First, the court had to determine the nature of Ravin's rights and then determine whether the state's impingement of those rights was justified. To do the latter, the court asked "whether there is a proper governmental interest in imposing restrictions on marijuana use and whether the means chosen bear a substantial relationship to the legislative purpose."[81] The state, if violating privacy, would have to show that "the relationship between the means and ends be not merely reasonable but close and substantial."[82] In other words, some form of "intermediate" scrutiny was being adopted.

Ravin argued that privacy is an independent right gaining special significance when the situs for exercise of the right is a specially protected area like the home. Like other courts, the Alaska court seemed to reject the notion of an independent right to privacy, saying that "the federal right to privacy arises only in connection with other fundamental rights, such as the grouping of rights which involve the home."[83] The court then turned to state law, noting the specific enumeration of a right to privacy in the Alaska constitution, an enumeration which "does not, in and of itself, yield answers concerning what scope should be accorded the right of privacy."[84] The court observed that privacy has met with little favor as a defense in marijuana cases, and admitted that:

> [a]ssuming this court were to continue to utilize the fundamental right-compelling state interest test in resolving privacy issues . . . we would conclude that there is not a fundamental constitutional right to possess or ingest marijuana in Alaska . . . . [T]he right to privacy amendment . . . cannot be read so as to make the possession or ingestion of marijuana itself a fundamental right.[85]

Up to this point, the court was in agreement with every other court's analysis of the problem, since it had essentially said that there is no fundamental right of possession and use under state or federal law.

However, the court went on to say that "Ravin's right to privacy contentions are not susceptible to disposition solely in terms of answering the question whether there is a general fundamental constitutional right to possess or smoke marijuana."[86] Instead the court pursued a more detailed examination of privacy and especially the relevance of the home as situs.

The court had previously declared that the federal right of privacy exists only in conjunction with other fundamental rights, and that the state constitutional right of privacy did not per se include a right of possession and use of marijuana. Nonetheless the court held that privacy in the home is a fundamental right, under both the federal and Alaska constitutions, a right broad enough to protect possession of marijuana in the home, subject to the limitations that the "guarantee to possession" exists only for "purely private, noncommercial use in the home" and that the right must yield "when it interferes in a serious manner with the health, safety, rights and privileges of others or with the public welfare."[87]

The court traced this fundamental right of privacy in the home to the guarantees of the Third, Fourth, and Fifth Amendments to the Federal Constitution (centering on the protection of the home); the Griswold decision (which aims to keep police from "search[ing] the sacred precincts of the marital bedroom"); the emphasis in Stanley on the home as "the situs of protected activities"; and the strong emphasis on individuality in Alaska. In short, the court asserted that the concept of "home" lies at the core of the right of privacy; whether the activity occurring within the home is or is not a fundamental right is unimportant. This privacy:

> would encompass the possession and ingestion of substances such as marijuana in a purely personal, noncommercial context in the home unless the state can meet its substantial burden and show that proscription of possession of marijuana in the home is supportable by achievement of a legitimate state interest.[88]

The state had to show "a close and substantial relationship between the public welfare and control of personal possession and use in the home."

The Court then discussed the possible deleterious effects of marijuana and found that the "one significant risk in use . . . we do find established to a reasonable degree of certainty is the effect of marijuana intoxication in driving."[89] This risk established the necessary nexus between private conduct and public welfare; therefore regulation of personal use while driving was permissible.[90]

However, the state had not demonstrated the necessary nexus between private conduct and public health in the context of personal use within the house. The Court announced:

> the general proposition that the authority of the state to exert control over the individual extends only to activities which affect others or the public at large as it relates to matters of public health or safety, or to provide for the general welfare.[91]

Were the state able to show a substantial possibility that use of the drug would result in significant numbers of people "burdening the public welfare," the state could reach private use of the drug.[92] Unable to show this with marijuana, the legislation failed. "[S]cientific doubts will not suffice. The state must demonstrate a need based on proof that the public health or welfare will in fact suffer if the controls are not applied."[93]

Thus, the Supreme Court of Alaska was emphatically not declaring personal use of marijuana to be a fundamental right, worthy of the highest constitutional protections. Instead, the court asserted that some activities are so personal and have so little impact on society at large, that the state cannot reach those activities when they occur in private. The decision sets limits on the police power as much as it expands the notion of a constitutional value of privacy. A showing of some negative impact on the individual from the use of marijuana was not enough to sustain the legislation (a showing which is sufficient under the minimum rationality test). Rather, the state had to show a nexus between the personal use of marijuana and the public health or welfare, a showing the state could not make.

The Ravin analysis is not dissimilar to that of the "lifestyle" cases; in both contexts the courts are carving out protection for non-fundamental "personal" choices and limiting the reach of the police power to "real" public purposes. This solicitude for personal autonomy has gained enough adherents in the lower courts to make other Ravin-like decisions a distinct possibility if the legislatures fail to take action on their own.

Constitutional Limits on Penalties for Consumption-Related Offenses

Even if the state may legitimately prohibit and penalize possession of marijuana, there are clearly constitutional limits on the type and severity of sanctions which may be imposed on violators. Certainly long terms of confinement for simple possession would be unconstitutionally excessive. Indeed, classification of simple possession of marijuana as a felony may well violate the Eighth Amendment prohibition against cruel and unusual punishment and also deny the user equal protection of the laws. The felony classification probably violates the Eighth Amendment because the stigmatic consequences of conviction and multiyear imprisonment in the penitentiary are greatly disproportionate to the conduct proscribed. As noted earlier, three tests measure excessiveness of a penalty: (1) the nature of the offense and its seriousness, particularly its impact on the public; (2) penalties for comparable offenses in the same jurisdiction; and (3) penalties for the same offense in other jurisdictions. Under each of these tests, felony penalties for simple possession are now unconstitutionally excessive.

If the felony classification derives from the grouping of marijuana with the more dangerous drugs for penalty purposes, then the classification may deny the marijuana offender equal protection of the laws under the reasoning of the cases noted earlier in connection with distribution penalties. Under the same approach, it is also possible that incarceration per se is an unconstitutional sanction for the personal use of marijuana. Several courts, while upholding the statutorily mandated penalties as constitutional, have precluded incarceration as a matter of judicial policy. For example, the New Jersey Supreme Court, in State v. Ward,[94] said that a suspended sentence with probation would normally be a sufficient penalty for a person convicted for the first time of possession for personal use. In addition, in New York, a jurisdiction noted for its harsh penalties, a court, while upholding indeterminate sentencing and felony-treatment for those convicted of possession, ordered the defendant to be released from Attica and into the custody of an inpatient treatment program.[95] Even if incarceration (and criminal stigma) is not now unconstitutionally excessive because most states permit it, it is conceivable that the path of legislative reform may alter the constitutional balance in the foreseeable future.

FOOTNOTES

[1] The definition of "cannabis" adopted by the Commission is: "Cannabis means the flowering or fruiting tops of the cannabis plant (excluding the seeds and leaves when not accompanied by the tops) from which the resin has not been extracted, by whatever name they may be designated." Marijuana is the cannabis preparation most commonly found in the United States. It is important to note that the seeds and leaves are excluded from the Commission's definition, so long as they are not accompanied by the tops.

[2] The information concerning the provisions of the Single Convention was distilled from National Commission on Marihuana and Drug Abuse, Marihuana: A Signal of Misunderstanding, Appendix Volume 1, pp. 531-546 (1972) and National Commission on Marihuana and Drug Abuse, Marihuana: A Signal of Misunderstanding, First Report, pp. 165-166 (1972).

[3] See Health, Education, and Welfare, Marihuana and Health (1975).

[4] Petition den. by DEA Acting Administrator, 40 Fed. Reg. 44164-68 Sept. 25, 1975, appeal pending NORML v. DEA #75-2025.

[5] In 1973, the National Conference of Commissioners on Uniform State Laws, which promulgated the Uniform Controlled Substance Act, amended the act so that possession of 1 ounce or less of marijuana would not be an offense.

[6] This section focuses on the record consequences of arrest or conviction for possession or sale of marijuana for personal use. Since the trend is to classify such consumption-related behavior as a misdemeanor, this section will describe only record reforms as they relate to misdemeanors. It should be noted that in states where consumption-related behavior remains a felony offense, it is generally more difficult to seal or expunge a record.

[7] Purging, sealing, and the right to state the nonexistence of a record are the only reforms which will be discussed here. Other reform measures that have been adopted include the right to inspect and challenge records, the regulation of dissemination of records, and the removal of legal disabilities. These measures are not discussed, because it is believed that they do not offer relief as significant as that offered by the three measures presented in the text.

[8] The information on the general expungement provisions was derived from Law Enforcement Assistance Administration, Compendium of State Laws Governing the Privacy and Security of Criminal Justice Information (1975). Caution should be used in relying on the data, since no effort has been made to update this report.

[9] N.J.S.A. § 2A:164-28.

[10] Alaska Statutes § 12.62.040(a)(3); Massachusetts General Laws § 100A; Ohio Revised Code Ann. § 2953.32; Oregon Revised Statutes § 137.225; Utah Code Ann. § 77-36-17.5.

[11] D.C. Code § 4-137.

[12] Ariz. Rev. Stat. § 41-1750E.

[13] Alaska Statutes § 12.62.040(a)(3); Arkansas Stat. Ann. § 5-840; Connecticut Gen. Stat. §§ 54-90, 29-15(a); Hawaii Rev. Stat. § 28-54; Illinois Stat. Ann. § 206-5; Iowa Code Ann. §§ 749B.16-749B.17; Idaho Code § 19-4813(1); Massachusetts Gen. Laws § 100C; Michigan Compiled Laws § 28.243; Minnesota Stat. Ann. § 299 C.11; McKinney's New York Laws § 78-e; Rev. Code of Washington § 43.43.730(1); West Virginia Code § 15-2-29(h); Florida Stat. Ann. § 74-206; 16 Maine Code § 600; New Jersey Stat. Ann. §§ 2A:85-15 to 2A:85-23.

West Virginia permits removal of arrest records only where the arrestee has been acquitted. The other states permit removal in all cases where there is a disposition favorable to the arrestee.

[14] Arizona Rev. Stat. § 13-1761 does provide that one who is "wrongfully" charged with a crime may petition the court to seal the record of his arrest, if he first secures a written statement from the prosecutor that he will not be prosecuted. What is not known is whether the chief of the criminal identification section has promulgated guidelines under Arizona Rev. Stat. § 41-1750E to expunge or seal arrest records which result in other favorable dispositions.

[15] Of the 16 states listed in note 13, only Massachusetts, Florida, and New Jersey do not permit total expungement of arrest records.

[16] Arkansas is the only state that does not permit immediate removal of records. Favorable arrest records are purged on or before January 1 of each year in that state. The rationale behind this provision appears to be administrative convenience rather than a desire to further inconvenience the arrestee.

[17] Alaska, Arkansas, Connecticut, Iowa, and Michigan.

[18] In Illinois and New Jersey, the provisions are discretionary. Moreover, in Illinois the court may not remove the records unless the arrestee agrees to waive all claims he may have against the arresting officers. While the Massachusetts statute is mandatory only as to acquittals and discretionary as to other nonconviction dispositions, administrative regulations make expungement of arrest records mandatory in all instances of favorable disposition.

[19] Hawaii, New York, Washington, and West Virginia do not permit expungement if the arrestee has any criminal conviction record. Illinois and Michigan have basically similar provisions, the only difference being that arrestees with prior convictions of minor traffic offenses may also obtain expungement in Michigan and Illinois. In Minnesota, the only person barred from the expungement provision is one who has been convicted of a felony within 10 years preceding the instant arrest.

[20] Ohio, Oregon, and Utah.

[21] Florida Stat. Ann. § 74-206; Massachusetts Gen. Laws §§ 100A-100C; New Jersey Stat. Ann. § 2A:85-21; Ohio Rev. Code § 2953.32(B); Oregon Rev. Stat. § 137.225; Utah Code Ann. § 77-35-17.5; Connecticut Gen. Stat. § 54-90(e); Rev. Code Washington § 162-12-140; 16 Maine Code § 600.

[22] This approach is taken in Connecticut, Florida, Massachusetts, New Jersey, Oregon, and Utah.

[23] Arkansas, Delaware, Florida, Georgia, Idaho, Illinois, Iowa, Louisiana, Maryland, Michigan, Massachusetts, Mississippi, Missouri, Nevada, New Jersey, New Mexico, North Carolina, North Dakota, Oklahoma, Pennsylvania, South Carolina, South Dakota, Texas, Utah, Virginia, West Virginia, Wisconsin, Wyoming, Guam, Puerto Rico, and Virgin Islands.

[24] If the defendant violates the terms of his probation, the judge may enter an adjudication of guilt and proceed to sentencing.

[25] Illinois, Maryland, South Dakota, and Texas.

[26] Florida, Maryland, Massachusetts, Pennsylvania, South Dakota, West Virginia, Guam, and Puerto Rico.

[27] Mississippi, Missouri, Nevada, New Jersey, New Mexico, North Carolina, South Carolina, and Virgin Islands. "Minor" here normally refers to persons under the age of 21; however, two states permit expungement for persons under the age of 25.

[28] Since the Uniform Act does not offer the conditional discharge option to those charged with possession with intent to sell, it may be argued that these provisions do not limit the option. Instead it may be that these states have merely defined intent to sell by the amount of marijuana possessed.

[29] Minnesota, South Dakota, Maine, Alaska, Colorado, California, Ohio, and Oregon. The fine-only provision also applies to the sale of small amounts of marijuana in Colorado and California and to gifts of less than 20 grams in Ohio. The South Dakota statute will not become effective until 1977.

[30] Alabama, Indiana, Kentucky, Kansas, Montana, Nebraska, New Hampshire, and Vermont.

[31] *State* v. *Kaplan*, 23 N.C. App. 410, 209 S.E. 2d 325 (1974).

[32] See, e.g., *State* v. *Donovan*, 344 A. 2d 401 (Me. 1975); *State* v. *O'Bryan*, 96 Idaho 548, 531 P. 2d 1193 (1975); *State* v. *Leins*, 234 N.W. 2d 645 (Iowa 1975); *People* v. *Alexander*, 56 Mich. App. 400, 223 N.W. 2d 750 (1974); *People* v. *Riddle*, 65 Mich. App. 433, 237 N.W. 2d 491 (1975). For cases simply denying the proposition that the state may only regulate, not prohibit, distribution of marijuana, see *Winters* v. *State*, 545 P. 2d 786 (Okl. Crim. 1976); *Crow* v. *State*, 551 P. 2d 279 (Okl. Crim. 1976), labeling appellant's claim "patently frivolous"; there are in addition a host of cases too long to enumerate.

[33] See, e.g., *United States* v. *Kiffer*, 477 F. 2d 349 (2d Cir. 1973); *United States* v. *Maiden*, 355 F. Supp. 743 (1973).

[34] *United States* v. *Maiden*, 355 F. Supp. at 747; also *United States* v. *Kiffer*, 477 F. 2d 349 (2d Cir. 1973).

[35] Particularly *Stanley* v. *Georgia*, 394 U.S. 557 (1969) and *Griswold* v. *Connecticut*, 381 U.S. 479 (1965)

[36] *United States* v. *Horsley*, 519 F. 2d 1264, 1265 (5th Cir. 1975).

[37] *State* v. *Baker*, 535 P. 2d 1394 (Hawaii 1975).

[38] *Ravin* v. *State,* 537 P.2d 494 (Alaska 1975).

[39] *Belgarde* v. *State,* 543 P.2d 206 (Alaska 1975).

[40] *State* v. *O'Bryan,* 96 Idaho 548, 531 P.2d 1193 (1975); *People* v. *Chalk,* 25 Ill.App.3d 87, 322 N.E.2d 513 (1975); *State* v. *Teten,* 192 Neb. 800, 224 N.W.2d 541 (1974); *Ainsworth* v. *State,* 304 So.2d 656 (Miss. 1974); *Hall* v. *State,* 306 So.2d 290 (Ala. 1974); *Hooper* v. *State,* 514 S.W.2d 394 (Ark. 1974); *State* v. *Holzapfel,* 192 Neb. 672, 223 N.W.2d 670 (1974); *State* v. *Wiitala,* 192 Neb. 727, 223 N.W.2d 841 (1974); *Commonwealth* v. *DiSantis,* 228 Pa. Super. 61, 323 A.2d 269 (1974); *Commonwealth* v. *Stone,* 229 Pa. Super. 24, 323 A.2d 184 (1974); *Manuel* v. *Salisbury,* 497 F.2d 388 (1974); *State* v. *Penn.,* 192 Neb. 156, 219 N.W.2d 445 (1974); *Flake* v. *State,* 296 So.2d 692 (Miss. 1974); *Poe* v. *State,* 513 S.W.2d 545 (Tex. Crim. App. 1974); *State* v. *Benge,* 110 Ariz. 473, 520 P.2d 843 (1974); *Boone* v. *State,* 291 So.2d 182 (Miss. 1974); *State* v. *Robbins,* 110 Ariz. 284, 518 P.2d 107 (1974); *Racy* v. *State,* 520 P.2d 375 (Okl. Crim. 1974); *Dumka* v. *State,* 507 S.W.2d 71 (Mo. 1974); *People* v. *Barnes,* 16 Ill.App.3d 837, 306 N.E.2d 892 (1974); *Fite* v. *State,* 513 P.2d 1396 (Okl. Crim. 1973); *Disheroon* v. *State,* 514 P.2d 685 (Okl. Crim. 1973); *State* v. *MacDonald,* 110 Ariz. 152, 515 P.2d 1172 (1973); *State* v. *Golightly,* 495 S.W.2d 746 (1973); *State* v. *Still,* 208 N.W.2d 887 (Iowa 1973); *Trantham* v. *State,* 508 P.2d 1104 (Okl. Crim. 1973); *Haggerty* v. *State,* 490 S.W.2d 858 (Texas Crim. App. 1973); *State* v. *Shimp,* 190 Neb. 627, 206 N.W.2d 627 (1973); *U.S.* v. *Sanders,* 466 F.2d 673 (9th Cir. 1972); *State* v. *Boose,* 202 N.W.2d 368 (Iowa 1972); *People* v. *Bell,* 53 Ill.2d 122, 290 N.E.2d 214 (1972); *State* v. *Rogalsky,* 18 Ariz. App. 296, 501 P.2d 565 (1972); *Wright* v. *State,* 500 P.2d 868 (Okla. Crim. 1972); *State* v. *Celaya,* 107 Ariz. 175, 484 P.2d 7 (1971); *State* v. *Godwin,* 13 N.C.App. 700, 187 S.E.2d 400 (1972).

[41] 115 N.J. Super. 400, 279 A.2d 900 (1971).

[42] 387 Mich. 167, 194 N.W.2d 827 (1972).

[43] 194 N.W.2d at 831, emphasis added by court.

[44] 194 N.W.2d at 831.

[45] 194 N.W.2d at 831-832.

[46] 194 N.W.2d at 833.

[47] 518 F.2d 1288 (6th Cir. 1975), vac. in light of statutory revisions, 423 U.S. 993 (1975).

[48] 408 U.S. 238 (1972).

[49] *People* v. *Venable*, 46 A.D.2d, 361 N.Y.S.2d 398 (1974).

[50] *People* v. *Broadie*, 37 N.Y.2d 100, 332 N.E.2d 338, 371 N.Y.S.2d 471 (1975).

[51] One commentator suggests that the *Broadie* decision in particular will have little value as precedent in other jurisdictions, since the drug problem in New York is on a scale found nowhere else. "Drug Offenders--Mandatory Life Sentences For Drug Sellers Held Not Cruel and Unusual Punishment." *Dick. L. Rev.* 80:346 (1975).

[52] *In re Jones*, 35 Cal.App.3d 531, 110 Cal.Rptr. 765 (1974).

[53] *In re Foss*, 10 Cal.3d 910, 519 P.2d 1073, 112 Cal.Rptr. 649 (Sup. 1974).

[54] *People* v. *Vargas*, 53 Cal.App.3d 516, 126 Cal.Rptr. 88 (1975).

[55] *In re Flores*, 58 Cal.App.3d 222, 128 Cal.Rptr. 847 (1976).

[56] 49 Ill.2d 338, 275 N.E.2d 407 (1971).

[57] 275 N.E.2d at 409.

[58] 275 N.E.2d at 413.

[59] 387 Mich. 91, 194 N.W.2d 878 (1972).

[60] See, e.g., *People* v. *Bourg*, 552 P.2d 504 (Colo. 1976); *Warden* v. *Sparks*, 541 P.2d 651 (Nev. 1975); *People* v. *Harris*, 531 P.2d 384 (Colo. 1975); *English* v. *Va. Probation and Parole Board*, 481 F.2d 188 (4th Cir. 1973); *Attwood* v. *State*, 509 S.W.2d 342 (Tex. Crim. App. 1974); *State* v. *Yanich*, 110 Ariz. 172, 516 P.2d 308 (1974); *Gaskin* v. *State*, 490 S.W.2d 521 (Tenn. 1973); *Commonwealth* v. *Leis*, 243 N.E.2d 898 (1969); *State* v. *Burrow*, 514 S.W.2d 585 (Mo. 1974); *Boswell* v. *State*, 276 So.2d 592 (Ala. 1973).

[61] See, e.g., *U.S.* v. *DiLaura*, 394 F. Supp. 770 (Mass. 1974); *U.S.* v. *Hobbs*, 392 F. Supp. 444 (Mass. 1975); *U.S.* v. *Harper*, 530 F.2d 828 (9th Cir. 1976); *U.S.* v. *Umentum*, 401 F. Supp. 746 (Wisc. 1975);

U.S. v. *Castro*, 401 F. Supp. 120 (Ill. 1975); *U.S.* v. *Brookins*, 383 F. Supp. 1212 (D.N.J. 1974); *State* v. *Beck*, 329 A. 2d 190 (R.I. 1974); *Breckenridge* v. *Smith*, 476 F. 2d 288 (5th Cir. 1973); *Tracey* v. *Janco*, 351 F. Supp. 836 (1972); *Rener* v. *Beto*, 447 F.2d 20 (5th Cir. 1971).

[62] *U.S.* v. *Maiden*, 355 F. Supp. at 748; *U.S.* v. *Kiffer*, 477 F. 2d at 357.

[63] *U.S.* v. *Maiden*, 355 F. Supp. at 747.

[64] *State* v. *Anonymous*, 32 Conn. Sup. 324, 355 A. 2d 729 (1976).

[65] One author has suggested that a right of possession necessarily includes a right of distribution, since exercise of the former is impossible without the existence of the latter; this view has not been adopted by any court or legislatures at this point. *See* Soler, "Of Cannabis and the Courts: A Critical Examination of Constitutional Challenges to Statutory Marijuana Prohibitions." 6 *Conn. L. Rev.* 601, 701-702 (1974).

[66] See *People* v. *McCaffrey*, 29 Ill. App. 3d 1088, 332 N.E. 2d 28 (1975); *Ravin* v. *State*, 537 P. 2d 494 (Alaska 1975); *NORML* v. *Guste*, 380 F. Supp. 404 (1974); *Blincoe* v. *State*, 231 Ga. 886, 204 S.E. 2d 597 (1974); *Kreisher* v. *State*, 319 A. 2d 31 (Del. Sup. Ct. 1974); *State* v. *Renfro*, 542 P. 2d 366 (Hawaii 1975); *State* v. *Nugent*, 125 N.J. Super. 528, 312 A. 2d 158 (1973). Courts in this context apply a "rational relationship" test, rather than "strict scrutiny" in which the state would have a more difficult burden in justifying the distinctions drawn between marijuana on the one hand and alcohol and tobacco on the other. The lesser level of scrutiny is used because the right to use marijuana is not a fundamental right--*see* Soler, "Of Cannabis and the Courts", 6 *Conn. L. Rev.* at 606, and cases cited there at note 29.

Courts have also found to be without merit arguments that the right to use marijuana is a means of expression protected by the First Amendment in, *inter alia*, *State* v. *Renfro*, 542 P. 2d 366 (Hawaii 1975). A claim that the Ninth Amendment contains a right of "pursuit of happiness" embracing the use of marijuana was rejected in *State* v. *Leins*, 234 N.W. 2d 645 (Iowa 1975), and in *People* v. *Glaser*, 48 Cal. Rptr. 427 (1965), *cert. den.* 385 U.S. 880 (1966).

[67] See, e.g., *People* v. *Riddle*, 65 Mich. App. 433, 237 N.W. 2d 491 (1975); *People* v. *Alexander*, 56 Mich. App. 400, 223 N.W. 2d 750 (1974); *State* v. *Tabory*, 196 S.E. 2d 111 (1973); *People* v. *Demers*, 42 A.D. 2d 634, 345 N.Y.S. 2d 184 (1973).

[68] See, e.g., *Griswold* v. *Connecticut*, 381 U.S. 479 (1965); *Stanley* v. *Georgia*, 394 U.S. 557 (1969); *Paris Adult Theatre I* v. *Slaton*, 413 U.S. 49 (1973).

[69] There were at the time this issue was first raised two ways to view the right to privacy. One view suggested that privacy was more than anything equivalent to personal autonomy, that an individual was largely free to do as he or she pleased with the body. This view relied heavily on the abortion cases for support. The other view saw privacy as situs-related, arising out of a felt need to protect certain activities which occurred *in the home*. This view, supported by the *Stanley* and *Paris Adult Theatre* line of cases, took a more constricted view of privacy, but turned out to be more in tune with later Court rulings than the former, more libertarian view. For further discussion and development of these points, see "Right of Privacy--Possession of Marijuana, *Ravin* v. *State*, 537 P.2d 494 (Alaska 1975)," 1976 *Wis. L. Rev.* 305, 311-314 (1975).

[70] *U.S.* v. *Kiffer*, 477 F.2d 349, 354; *U.S.* v. *Maiden*, 355 F. Supp. 743, 746.

[71] *See*, e.g., the concurrence of Justice Kavanagh in *People* v. *Sinclair*, 387 Mich. 91, 133, 194 N.W.2d 878, 896 (1972), and the dissent of Justice Levinson in *State* v. *Kantner*, 53 Hawaii 327, 347, 493 P.2d 306, 313 (Hawaii 1972).

[72] 394 U.S. 557, 568 n. 11. Some commentators, noting that the Court refers here to "narcotics," say this disclaimer would not apply to marijuana since marijuana is not a narcotic, or at least is not as harmful as a narcotic. Soler, "Of Cannabis and the Courts," 6 *Conn. L. Rev.* at 696. Courts which rely on the *Stanley* note obviously disagree.

[73] *NORML* v. *Guste*, 380 F. Supp. 404, 406-407 (1974); *Kreisher* v. *State*, 319 A.2d 31 (Del. Sup. Ct. 1974); *State ex. rel. Conaty*, 187 S.E.2d 119, 123 (1972).

[74] *State* v. *Baker*, 535 P.2d 1394 (1975).

[75] 535 P.2d at 1398.

[76] 535 P.2d at 1398.

[77] 535 P.2d at 1400, emphasis added.

[78] *Epperson* v. *Board of Trustees, Pasadena Ind. Sch. Dist.*, 386 F. Supp. 317 (S.D. Texas 1974); *Pendley* v. *Mingus U.H.S. Dist. No. 4 of Yarapas County*, 109 Ariz. 18, 504 P.2d 919 (1972); *Karr* v. *Schmidt*, 460 F.2d 609 (5th Cir. 1972), *cert. den.* 409 U.S. 989 (1972); *King* v. *Saddleback Junior College District*, 445 F.2d 932 (9th Cir. 1971), *cert. den.* 404 U.S. 979 (1971); *Valdes* v. *Monroe County Bd. of Public Instruction*, 325 F. Supp. 572 (S.D. Fla. 1971), *aff'd without opinion* 468 F.2d 952 (5th Cir. 1972); *Jeffers* v. *Yuba City Unified School District*, 319 F. Supp. 368 (E.D. Calif. 1970); *Freeman* v. *Flake*, 448 F.2d 258 (10th Cir. 1971); *Jackson* v. *Dorrier*, 424 F.2d 213 (6th Cir. 1970), *cert. den.* 400 U.S. 850 (1970); *Ferrel* v. *Dallas Independent School District*, 392 F.2d 697 (5th Cir. 1968), *cert. den.* 393 U.S. 856 (1968); *Montalvo* v. *Madera Unified School Dist. Bd. of Ed.*, 21 Cal.App.3d 323, 98 Cal.Rptr. 593 (1972).

[79] *Parker* v. *Fry*, 323 F. Supp. 728 (E.D. Ark. 1971); *Lansdale* v. *Tyler Junior College*, 470 F.2d 659 (5th Cir. 1972), *cert. den.* 411 U.S. 986 (1973); *Bishop* v. *Colaw*, 450 F.2d 1069 (8th Cir. 1971); *Massie* v. *Henry*, 455 F.2d 779 (4th Cir. 1972); *Stull* v. *School Board of Western Beaver Jr.-Sr. H.S.*, 459 F.2d 339 (3d Cir. 1972); *Conrad* v. *Goolsby*, 350 F, Supp. 713 (N.D. Miss. 1972); *Torvik v. Decorah Community Schools*, 453 F.2d 779 (8th Cir. 1972); *Berryman* v. *Hein*, 329 F. Supp. 616 (D. Idaho 1971); *Holsapple* v. *Woods*, 500 F.2d 49 (7th Cir. 1974); *Martin* v. *Davison*, 322 F. Supp. 318 (W.D. Pa. 1971).

Other courts found the right of personal appearance in the Ninth Amendment, in the rights retained by the people (this is *not* a privacy analysis). These cases include: *Arnold* v. *Carpenter*, 459 F.2d 939 (7th Cir. 1972), which said the right comes either from the First or Ninth Amendment; *Breen* v. *Kahl*, 419 F.2d 1034 (7th Cir. 1969); *Reichenberg* v. *Nelson*, 310 F. Supp. 248 (D. Neb. 1970); *Berryman* v. *Hein*, *supra* (from the Ninth and/or Fourteenth Amendments).

One court found a violation of the equal protection clause because only long-haired males were being suspended from school; this to the court was an invidious discrimination. *Miller* v. *Gillis*, 315 F. Supp. 94 (N.D. Ill. 1969).

[80] *Ravin* v. *State*, 537 P.2d 494 (Alaska 1975).

[81] 537 P.2d at 498.

[82] 537 P.2d at 498.

[83] 537 P.2d at 500.

[84] 537 P.2d at 501.

[85] 537 P.2d at 502.

[86] 537 P.2d at 502.

[87] 537 P.2d at 504.

[88] 537 P.2d at 504.

[89] 537 P.2d at 508.

[90] 537 P.2d at 511.

[91] 537 P.2d at 509.

[92] 537 P.2d at 509.

[93] 537 P.2d at 511.

[94] *State* v. *Ward*, 57 N.J. 75, 270 A.2d 1 (1970).

[95] *People* v. *Young*, 46 A.D.2d 202, 361 N.Y.S.2d 762 (1974). Similarly, in *People* v. *Kane*, 31 Ill.App.3d 500, 333 N.E.2d 247 (1975), the court reduced a minimum 7-year sentence to a minimum of 4 years, so that the defendant could be considered for parole earlier--again, rehabilitation was the focus.

V. CASE STUDIES

This chapter contains the case studies prepared by the PMM&Co. study team based on visits to nine states selected by the advisory panel. The purpose of the site-visit component was to:

- document the process of change by which alternative marijuana possession penalty approaches were considered, evaluated, and decided upon by state policymakers, including the Governor, the legislature, and the courts; and

- conduct a limited evaluation of the impact that significant policy changes have had on marijuana-use trends within a particular state, largely on the basis of secondary data and information sources because of the time and resource limitations of this project.

To maximize the use of the available study resources, the methodology for the case studies utilized two tiers of investigation. One tier was limited to a documentation of the process of change, based upon a 2- to 3-day visit to state capitals and interviews with executive, judicial, and legislative branch officials; media representatives; and private citizens. The second tier site visit included an investigation of the impact of significant change, as well as documentation of the process by which such change occurred.

The PMM&Co. study team and advisory panel used the following criteria to select the states:

- Timing: Change must be recent enough to provide for information availability. For potential impact states, however, enough time should have elapsed to allow for impact measurement.

- Magnitude: Generally, those states with greater change are preferable to those with lesser change.

- Incidence of Use: States with greater marijuana incidence are preferable to those with lesser.

- Prior Information: Preferably, states in which previous marijuana issue analysis has been performed should be chosen.

- Penalty Reduction Levels: States should be chosen with different penalty levels.

- Internal Disparity: States should be chosen which have different socioeconomic frameworks.

- Cooperation: States should be chosen with the greatest potential of cooperation from state and local officials.

- Data Availability: States which have previously collected use or impact data are preferable.

Based upon these criteria, the preliminary research findings, and discussions with the advisory panel, the following states were selected for on-site interviews to document the process of change and to evaluate the impact:

- California;
- Ohio; and
- Texas.

The following six states were visited to document the process of change only:

- Colorado;
- Iowa;
- Louisiana;
- Maine;
- Minnesota; and
- New Jersey.

To enhance the evaluation component, local jurisdictions in each of the impact states were also visited. These additional intrastate site visits included:

- Los Angeles, California;
- San Mateo, California;

- Columbus, Ohio;
- Austin, Texas; and
- Dallas, Texas.

Wherever possible, the structure of each case study is similar, although modifications were made to accommodate specific findings and data availability, particularly since the objective of each site visit was to collect existing data and information and not to conduct original research or to apply evaluation techniques. Generally, the structure of each case study includes:

- a summary of the process of change (and impact, when appropriate);
- a "political history" of the process of change developed from the interviews with executive branch, legislative, and media personnel;
- a description of the primary components of the previous and current statutes;
- available statistics on marijuana use patterns and trends; and
- evaluation of impact (particularly for California, Ohio, and Texas) developed from interviews and available data.

The panel believes that the experiences, impressions, and data obtained during this research effort will be of interest and use to state policymakers. For this reason, a complete record of these research findings is included in this volume.

CALIFORNIA

SUMMARY

Until 1976, California had one of the most stringent marijuana laws in the nation.[1] For a first offense, possession for personal use, regardless of amount, was punishable as either a misdemeanor or felony at judicial discretion. The second and any succeeding offense was a felony with a minimum prison term of 2 years. State estimates suggest that the cost of enforcing the marijuana law (police, courts, and jails) exceeded $100 million annually.

In 1975, the California state legislators passed, and the Governor signed into law, a significantly revised marijuana possession bill. The new law reduced the penalty for personal possession of 1 ounce or less to a misdemeanor, punishable as an infraction with a maximum fine of $100. Similar legislation had been attempted in the four preceding sessions of the state legislature, but the bills either failed to pass the state Senate or the (former) Governor vetoed them. A number of factors converged to permit passage of the recent statute.

Because the law went into effect only on January 1, 1976, limited impact assessments are possible. However, preliminary indications suggest that the law will have (and indeed already has had) significant impact on the criminal justice system. Highlights of some of the major impacts include:

- Total known arrests and citations have decreased significantly (up to and exceeding 50 percent), based on a comparison of first-half of 1975 and 1976 statistics.

- Approximately 70 percent of arrests and citations in the first half of 1976 were for possession of 1 ounce or less.

- It is estimated that enforcement and court processing cost savings for adult cases exceeded $25 million in 1976 compared to the previous year.

- The state is expected to receive at least $800,000 from fines generated by the counties in 1976, which is nearly double the 1975 amount.

POLITICAL HISTORY OF MARIJUANA DECRIMINALIZATION

Comparison of Past and Current Statutes

Between 1961 and 1968, possession of marijuana in California was punishable by imprisonment in state prison for 1 to 10 years, and the offender could not be released until at least 1 year had been served. Possession of marijuana for sale was punished by imprisonment for 2 to 10 years, and sale of marijuana by 5 years to life.

In 1968, the penalty for a first offense of possession of marijuana was revised. If the defendant had no prior convictions, judges were given discretion to punish marijuana possession either as a misdemeanor (up to 1 year in county jail) or as a felony (1 to 10 years in state prison). As a result of this misdemeanor option, the state's incarceration costs decreased.

In the early 1970s, however, the increasing use of marijuana led to increased enforcement, with nearly 100,000 adult and juvenile marijuana arrests in 1974. As a result of the increased costs, as well as other factors (i.e., increasing evidence that harsh penalties may be inappropriate, the close media monitoring of the Oregon decriminalization experience, and the election of a relatively more liberal legislature and Governor), Senate Bill 95 (SB 95) was passed by the legislature and signed by Governor Brown in the summer of 1975.

SB 95 reduced the penalty for personal possession of marijuana from a possible felony to a misdemeanor. Possession of 1 ounce or less of marijuana was made a citable misdemeanor punishable as an infraction with a maximum fine of $100 without regard to number of prior offenses. Procedurally, the alleged offender is released at point of citation upon proper identification, and thereby avoids custody, booking, and pretrial incarceration. Possession of more than 1 ounce was made a straight misdemeanor with a maximum $500 fine and/or 6 months in county jail. Three related misdemeanor offenses were also eliminated by SB 95:

- possession of "paraphernalia" related to the use of marijuana;
- visiting a site where marijuana is being used; and

- being under the influence of marijuana (although public intoxication with marijuana remains an offense).

SB 95 also provides for record destruction:

- anyone arrested since January 1, 1976, will have his or her arrest and/or conviction records destroyed automatically 2 years after the event; and

- anyone arrested prior to January 1, 1976, can have his or her records destroyed upon application. (This provision is being challenged by the State Attorney General.)

Cultivation, possession for sale, selling, importing, or transporting more than 1 ounce remain felonies. Possession of concentrated cannabis, such as hashish or hashish oil, remains an alternate felony or misdemeanor with a determinate sentence of 16 months to 3 years, if the felony sentence is imposed.

Table V-1 summarizes the previous and current laws for marijuana possession in California.

Process of Change

A number of factors converged during the 1975 session which permitted the passage of SB 95. Similar bills had been introduced during the four preceding legislative sessions, but failed to pass the legislature because of the:

- opposition of all law enforcement groups to any revision;

- opposition and "guaranteed" veto of the previous Governor; and

- strong media editorial support in Southern California for the existing harsh penalty structure.

Two penalty reduction bills, however, did pass both houses of the legislature but, as expected, were vetoed by the Governor.

During the 1975 session, a bill was introduced in both the Senate and Assembly which proposed that possession of less than 3 ounces be treated as an infraction with a fine and no incarceration. Although

TABLE V-1

PAST AND CURRENT CALIFORNIA PERSONAL MARIJUANA POSSESSION LAWS

PRIOR		CURRENT (1976)	
1961-1968	1969-1975	≤ 1 Ounce	> 1 Ounce
Any Amount Treated Identically	No Amount Differentiation	Misdemeanor Punishable as an Infraction	Misdemeanor
Felony, 1-10 Years	1st Offense Misdemeanor (0-1 Year) or Felony (1-10 Years)	Maximum $100 Fine, Regardless of Number of Prior Offenses	Maximum Penalty $500 Fine, 6 months, Regardless of Number of Prior Offenses
-Year Mandatory Minimum	2nd and Additional Offenses Felony (2-10 Years)		

passage of the bill was far from certain at the time of its proposal, certain conditions were developing or already existed that assured the bill of a full and complete hearing. These factors reflected the changed political situation that ultimately permitted enactment of the law.

Legislative Support

The two sponsors of the legislation had reputations as moderate, progressive, and socially responsive legislators, which helped generate the support of the "middle" spectrum of both the more liberal conservatives and the more conservative liberals. Further, because both were senior, long-tenured legislators, their "bank" of political IOUs could be, and indeed were, used during the crucial vote negotiations.

Harshness of Prior Law

The recognition by both the public and policymakers that the prior law was unnecessarily harsh provided impetus for major change. The law's strictness and the related burden placed on the courts and the criminal justice system generally encouraged consideration of major change rather than a modification of the existing law.

Governor's Nonopposition

The newly elected Governor, while not overtly supporting the bill (indeed, there is no evidence of any public statements during the debates), informally assured the legislators that if a bill lessening penalties were passed, he would sign it. The significance of this nonopposition was twofold: (1) if a bill passed, enactment was assured and (2) the differences between the old and new political environment were sharply drawn.

Strong Committee Staff

The proposed bill was first analyzed and debated in the Senate Judiciary Committee. California has a particularly strong staff system, and this committee had attracted a strong, intelligent staff with a long-standing commitment to the issue. Many of those interviewed attributed the ultimate passage to the committee's staff strength.

Proximity of Oregon

The geographic proximity of Oregon and the heavy media coverage of Oregon's marijuana decriminalization statute increased the readiness of the legislators and their constituency to accept major changes. In particular, California could view neighboring Oregon as a test case demonstrating that lessened penalties can be successfully implemented, with significant benefits for the criminal justice system.

Objective Media Coverage

In general, the media adopted an objective approach to the issue. "Scare" or "horror" stories regarding marijuana use were not used. Both proponents and opponents generally attempted to base their positions on facts rather than on an appeal to emotions. This approach precluded a "hardening" of political positions and permitted more rational debate. A number of major newspapers supported the bill editorially, including the Los Angeles Times, which had several years earlier opposed the decriminalization concept.

Nonelection Year Considerations

The consideration of the bill during a nonelection year was considered extremely important by those interviewed. It tended to eliminate a certain amount of emotion and purely political considerations.

Recent Legislative Studies

To strategically set the stage for legislative debate, the primary Senate supporters (and state drug abuse officials) encouraged the creation of a Select Committee on Control of Marijuana. The committee's final report, Marijuana: Beyond Misunderstanding, issued in 1974, documented the vast amount of criminal justice resources diverted to the enforcement of the existing laws. Further, and equally important, this document brought together all the relevant facts, use trends, criminal justice statistics, and national data, for legislative debate.

Nonopposition of the District Attorneys

One of the most important elements in the bill's passage and enactment was the decision to not actively oppose the bill by the California District Attorneys' Association, thus eliminating solid opposition by all law enforcement groups. This nonopposition permitted the more conservative legislators to make independent decisions to support the bill. Further, it created a coalition of health and enforcement constituencies not opposing its passage.

The District Attorneys' Association, however, demanded, and received, alterations in the original bill, as part of the negotiation, for their nonopposition.

- The personal use level for infraction purposes was reduced from 3 ounces to 1 ounce.

- The penalty structure was defined as a misdemeanor punishable as an infraction rather than as a straight infraction to permit the maintenance of trial by jury, search and seizure, and related procedural elements.

- The maintenance of marijuana arrest and citation records for 2 years before expungement was written into the legislation, rather than an immediate elimination of records.

The nonopposition by the district attorneys largely reflected their increasing concern with the burdens placed on the criminal justice system by the growing number of marijuana arrests, and the belief that the harmful effects of the drug may be much less than previously thought.

Some of the individuals interviewed during this study also felt that public interest and other groups such as the California Bar Association played an important role in securing the passage of the California law.

The bill passed the Senate Judiciary Committee and the full Senate relatively swiftly. Passage in the Assembly, however, was more difficult, and the bill escalated politically to a "caucus" vote along party lines. A coalition of the minority party voting as a bloc and members of the majority party representing more conservative districts blocked its passage on the first vote. According to those interviewed, only an elaborate last minute "arm twisting and calling of political IOUs" assured its passage in the Assembly.

IMPACT OF THE LAW

Preliminary Impact Assessment

The California State Office of Narcotics and Drug Abuse recently prepared a preliminary assessment of the new law. Obviously, the limited time since its effective date (January 1, 1976) precludes a full-scale evaluation. Nevertheless, the results contained in the report are quite startling and are summarized below.

Enforcement

Total known arrests and citations for marijuana possession in the first half of 1976 have decreased 47 percent for adults and 14.8 percent for juveniles, compared to arrests for marijuana possession during the first 6 months of 1975. Of the total known adult marijuana possession arrests and citations for the first half of 1976, 69.3 percent were for possession of 1 ounce or less, 13.6 percent were for possession of more than 1 ounce, and 17.0 percent were for possession of concentrated cannabis. The juvenile breakdown was 72.1 percent, 17.0 percent, and 10.9 percent, respectively. Comparing the two periods for marijuana trafficking, adult arrests declined 5 percent, and juvenile arrests increased 22.7 percent. A sample of marijuana seizure data from federal, state, and local agencies indicates an 11-percent decline in 1976 from the same period in 1975. An estimated $400,000 in additional revenue will be collected from the counties by the State General Fund in 1976 as a result of marijuana fines and forfeitures. This amount represents a doubling of the 1975 revenue for marijuana offenses.

Felony nonmarijuana drug arrests showed an 18.0-percent increase among adults and a 13.7-percent decrease among juveniles for the first half of 1976 compared to the same period in 1975. In the same periods, arrests for driving under the influence of a drug increased 46.2 percent for adults and 71.4 percent for juveniles, although the intoxicating drug is not identified in the data.

Criminal Justice System

Based on survey data and prior studies, police agency costs to enforce the marijuana possession laws for adults in the first half of 1976 were approximately $2,300,000, compared to $7,600,000 in the same period in 1975. Judicial system costs for adults for the first half of 1975, compared to the same period in 1976, were reduced from an estimated $9,400,000 to $2,000,000. Excluding court disposition costs, such as probation or jail, and excluding the criminal justice costs of processing citations in 1976, the total marijuana costs for the first half of 1975 were an estimated $17 million, compared to $4.4 million in the first half of 1976.

Drug Offender Diversion Program

Comparing diversions in 1975 and 1976, marijuana-related offenders were estimated to have decreased by 14,586 (71 percent) and "hard" drug divertees increased by 2,288 (62 percent), about 2,000 of whom were charged with the offense of being under the influence of heroin. In the first half of 1975, 61.5 percent of total marijuana possession defendants were granted diversion compared to only 20.6 percent of the marijuana possession offenders in the first 6 months of 1976 who chose diversion as a result of their court appearance.

A comparison of drug program enrollment with court diversions indicated that most marijuana divertees statewide had been sent to probation or school-based drug education classes rather than to drug abuse treatment programs prior to SB 95. Therefore, the new marijuana law reduced program enrollments minimally. However, an expanded diversion statute which went into effect at the same time as SB 95 authorized the diversion of more hard drug offenders, thereby actually increasing the Courts' need for drug treatment resources.

Summary of Comparative Arrest and Citation Data

Under SB 95, adult arrests and citations for marijuana possession during the first half of 1976 show a 47-percent decline compared to similar arrests for the first half of 1975 (see Table V-2). This appears to be an accelerated continuation of the enforcement decrease beginning in 1975.

According to those state officials interviewed:

- Enforcement has decreased and county and city law enforcement personnel are "simply paying less attention" to the marijuana user.

- California state criminal justice records include only the primary reason for arrest; the lower marijuana penalties are not reflected if a more serious crime is involved.

- The extensive records maintenance/expungement provision may have reduced local incentives to aggressively enforce a crime punishable only by a relatively small fine.

TABLE V-2

ADULT DRUG ARRESTS IN CALIFORNIA

DRUG ARRESTS	Total 1975	First Half 1975	First Half 1976	Percentage Change
ALL MARIJUANA (1)	59,408	30,033	17,171	–42.8
Possession	48,193*	24,351*	12,913*	–47.0
11357 a (concentrated)			2,203*	
11357 b (1 ounce or less)			8,944	
11357 c (>1 ounce)			1,750	
11360 c (1 ounce or less)			16	
Cultivation (2)	5,355*	2,706*	1,436*	–46.9
Trafficking (3)	5,860	2,976	2,827	–5.0
OTHER FELONY DRUGS (4)	33,161	15,786	18,621	+18.0
OTHER MISDEMEANOR DRUGS (5)	25,821	12,725	14,143	+11.1
11364 (Paraphernalia)	3,630	1,800	1,127	–37.4
11365 (In and About)	3,749	1,979	373	–81.2
11550 (Under Influence)	8,589	4,077	6,041	+48.2
23105 (Driving Under Influence Drugs)	4,616	2,228	3,258	+46.2
Other	5,237	2,641	3,344	+26.6
TOTAL	118,390	58,544	49,935	–14.7

(1) Marijuana figures for both years were derived from Bureau of Criminal Statistics monthly arrest and citation register agencies representing 70.358 percent of total adult marijuana arrests.

(2) BCS categorized marijuana possession (11357 H & S) and cultivation (11358 H & S) together in 1975 and prior years. We estimated that one of ten of the combined number were cultivation arrests. For 1976, BCS put cultivation in with 11357a (concentrated cannabis). Our 10 percent estimate for cultivation results in an estimate that nearly 40 percent of 11357a arrests in 1976 are for cultivation.

(3) Marijuana trafficking includes 11359 H & S (possession for sale); 11360 H & S (sale, importing or transporting) and 11361 H & S (involving a minor in sales or use).

(4) Other felony drug figures for both years were derived from BCS arrest and citation register agencies representing 77.24 percent of total other felony drug arrests.

(5) Figures for the misdemeanor offenses were derived by using arrest and citation register offenses as representing 66.6 percent of the state total.

*Based on Los Angeles Police Department arrest figures for cultivation, compared to possession, we estimated these numbers – See note (2) above.

Source: *A First Report of the Impact of California's New Marijuana Law (SB 95)*, State Office of Narcotics and Drug Abuse, January 1977.

Recent media reports suggested that the law is being enforced less vigorously in some parts of the state than in others. Table V-3 provides a county and regional distribution of comparative marijuana arrest and citation activity throughout the state in 1975 and the first half of 1976. A review of the percentage change column by county and region indicates that there was indeed a differential by region. Of the seven largest southern California counties, the data show an average decrease of 32.2 percent. By contrast, law enforcement agencies in the seven largest Bay Area counties indicate an average decrease in arrests and citations of 59.0 percent. A sample of the larger central valley and central coast counties averaged 40.7 percent fewer arrests and citations for marijuana possession and cultivation, while the rest of the state's smaller counties averaged a 63.4 percent decrease.

Criminal Justice Cost Impact

As part of the legislature's consideration of SB 95 and prior marijuana penalty bills, a substantial amount of research was conducted on the area of enforcement. The study submitted to the Senate Select Committee on Control of Marijuana estimated that over $100 million annually had been spent by state and local government agencies since 1970 enforcing marijuana laws. This study reviewed the number of marijuana offenders at each stage of the criminal justice process (i.e., arrest, prosecution, and confinement) and assigned cost/unit figures to the numbers of offenders in each stage. Expenditures were also included for local and state law enforcement agencies; prosecutors, judges, and public defenders cost in lower, superior, and appellate courts; and jail, prison, youth authority, probation, and parole costs. These estimates included the costs of adult and juvenile marijuana arrests; the cost of prosecuting adult felony marijuana offenders on whom information could be obtained through the judicial system; and the costs of commitments or adult offenders convicted in superior courts.

The study suggested that these estimates were somewhat tentative and perhaps conservative, because they did not include the costs of (1) processing approximately 20,000 adult marijuana arrestees on whom complaints were filed but whose court dispositions were not known, (2) commitments to various public agencies of some 8,310 felony marijuana defendants convicted in lower courts, (3) processing juvenile marijuana law offenders through the criminal justice system, (4) diversion and rehabilitation programs, and (5) peripheral government costs resulting from the marijuana laws, such as welfare payments to families of those incarcerated for marijuana law violations.

TABLE V-3

ADULT MARIJUANA POSSESSION AND CULTIVATION ARRESTS AND CITATIONS IN SELECTED CALIFORNIA COUNTIES[1]

COUNTY	MARIJUANA POSSESSION & CULTIVATION			PERCENT CHANGE
	Full 1975	1st Half 1975	1st Half 1976	
Southern California				
Los Angeles*	15,373	7,925	3,926	– 50.5
Orange*	3,577	1,477	1,429	– 3.2
Riverside	1,287	699	532	– 23.9
San Bernardino	1,674	857	326	– 62.0
San Diego*	1,809	906	594	– 34.4
Santa Barbara*	307	154	73	– 52.6
Ventura*	331	181	182	+ .6
Bay Area				
Alameda*	1,739	863	412	– 52.3
San Francisco	746	433	114	– 73.7
Santa Clara*	948	473	179	– 62.2
Contra Costa*	1,078	564	218	– 61.3
San Mateo	743	374	137	– 63.4
Marin	306	155	75	– 51.6
Solano	447	228	118	– 48.2
Central California				
Fresno*	385	111	81	– 27.0
Kern	886	412	236	– 42.7
Merced	308	182	99	– 45.6
San Joaquin	454	241	66	– 72.6
Stanislaus	533	261	151	– 42.1
Sacramento	916	480	278	– 42.1
Monterey	326	157	96	– 38.9
Santa Cruz	350	155	132	– 14.8
Other Counties	3,152	1,749	641	– 63.4
TOTAL	37,675	19,037	10,095	– 47.0

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[1] Data do not include approximately 30% of the state's marijuana possession arrests by agencies which were not on the Bureau of Criminal Statistics arrest register in both 1975 and 1976. Totals are not complete for the starred (*) counties, but those agencies which reported in both years can be compared in the incomplete counties as well as in the complete counties.

SOURCE: A First Report of the Impact of California's New Marijuana Law (SB 95), State Office of Narcotics and Drug Abuse, January 1977.

Because these components of marijuana law enforcement could not be estimated, the study suggested that the figure of $100 million was a minimum calculation: the actual costs to the taxpayer were probably much higher, possibly exceeding $150-175 million. The study also pointed out that the local law enforcement costs involved in making the initial 76,561 arrests in 1972 were only a portion of the total costs, since the bulk of fiscal costs occurred at the judicial, prosecution, and ultimate commitment stages of the criminal process. Thus the local law enforcement expenditures of approximately $144 per arrest in 1972 may be correct, but the disposition costs turn out to be much higher, approximately $1,200 to $2,800 per complaint filed.

In an attempt to discern trends over a 13-year period, the Senate Select Committee considered previous marijuana enforcement cost estimates in relation to the various legislative changes that have influenced these costs since 1960. The estimated annual costs, as reported by this committee, are contained in Table V-4.

When all marijuana offenses were punishable as felonies, the cost per arrest was approximately $1,630. In 1968, the costs per arrest were reduced by approximately $290, because dispositions could be handled as misdemeanors for first offense possession cases. Nevertheless, the costs of enforcing the marijuana laws in California continued to rise as the number of arrests continued to grow.

Using a different method of calculating costs for the 1975/1976 comparison, the State Office of Narcotics and Drug Abuse estimated adult enforcement and court system costs based on surveys and a previous impact study of the state's Drug Offender Diversion Program. Because of the decrease in individuals arrested for possession of marijuana between 1975 and the first half of 1976, the fiscal costs and work load at each stage of the criminal process were predictably lower. Before 1976, virtually every marijuana offender was arrested as a felon, field searched, taken into custody, transported to the jail for booking, and incarcerated pending possible release on own recognizance, the posting of bail, or arraignment. This general series of procedures followed for felony arrests in 1975 can be contrasted with the misdemeanor citation process for nearly 70 percent of the 1976 marijuana possession suspects. A preliminary evaluation of cost savings is provided in Table V-5.

Revenue to State and Local Governments

Another area in which SB 95 has had an impact is in revenues collected by state and local general funds. In California all fines

TABLE V–4

MARIJUANA ENFORCEMENT COST ESTIMATES IN CALIFORNIA

YEAR	MARIJUANA ARRESTS	ESTIMATED COSTS OF ENFORCEMENT	RELEVANT LAWS
1960	5,155	$ 8,402,650	All Arrests, Prosecution Commitments Handled as Felonies. Average Cost of Marijuana Dispositions per Arrest: $1,630
1961	3,794	6,184,220	
1962	3,743	6,101,090	
1963	5,518	8,994,340	
1964	7,560	12,322,800	
1965	10,002	16,303,260	
1966	18,243	29,147,418	
1967	37,514	61,147,820	
1968	50,327	72,07[illegible]860	
1969	55,176	43,100,000	Misdemeanor or Felony: Average Cost per Arrest: $1,340
1970	69,021	106,028,968	
1971	64,597	106,859,808	
1972	76,561	100,000,000	
TOTAL	407,211	$577,303,234	$44,407,941 Yearly

SOURCE: A First Report of the Impact of California's New Marijuana Law (SB 95), State Office of Narcotics and Drug Abuse, January 1977.

California Senate Select Committee on Control of Marijuana, Marijuana: Beyond Misunderstanding, May 1974.

TABLE V–5

ESTIMATED CALIFORNIA CRIMINAL JUSTICE COSTS IMPACTED BY SB 95*

CATEGORY	FIRST HALF 1975	FIRST HALF 1976
Law Enforcement	$ 7,597,513	$ 2,340,208
District Attorney	2,889,560	691,280
Public Defender	2,076,800	517,270
Courts	579,580	135,945
Probation**	3,870,720	704,200
	$17,014,173	$ 4,388,903

*Costs for 1976 do not include district attorney, public defender or court costs for processing 11357b cases (citation cases) which were not diverted.

**Diversion costs only calculated here, including 11357b cases diverted.

SOURCE: A First Report of the Impact of California's New Marijuana Law (SB 95), State Office of Narcotics and Drug Abuse, January 1977.

and bail forfeitures for marijuana-related violations are distributed by the county treasurer: 75 percent goes to the state general fund and the remaining 25 percent goes to the city general fund if the offense occurred in a city, or is kept by the county general fund if the offense occurred in an unincorporated area. Table V-6 illustrates the significant increase in revenue generated by SB 95.

ASSESSMENT OF THE LAW

Generally, the law enforcement officials and prosecutors interviewed in San Mateo and Los Angeles expressed the feeling that SB 95 has resulted in significant changes in citizen attitudes toward marijuana use and has created both enforcement and prosecution problems. In particular, this change in the law has caused other drug violations to receive lower priority from prosecutors.

Since the law has been in effect only since January 1, 1976, the lack of complete statistical information makes it difficult to fully assess the impact upon the criminal justice system. In San Mateo, for example, juvenile felony arrests for marijuana during the first 10 months of 1976 compared to the same period for 1975 have declined from 53 to 44 arrests. Although adult arrest statistics were not available, investigations in San Mateo indicate that adult arrests for marijuana violations have decreased similarly.

The San Mateo Police Department, however, issued 32 citations regarding marijuana offenses during the first 11 months of 1976. The police department has not reduced its manpower assigned to narcotics or its approach toward actively pursuing cases involving large quantities of marijuana. For example, approximately 9 of every 10 arrests made for violating marijuana laws are still made by patrolmen as opposed to investigators.

Table V-7 compares arrest data regarding marijuana by the Los Angeles Police Department for the first 11 months of 1976 to the same period in 1975. Although felony arrests for possession of marijuana for sale and transporting or furnishing marijuana have increased, substantial decreases have occurred in strictly possession arrests and, subsequently, total arrests. Those interviewed indicated two possible reasons for the decline in Los Angeles:

- Marijuana is no longer considered a major offense. Therefore if the person arrested is involved in other offenses along with marijuana violations, the other

TABLE V–6

CALIFORNIA STATE'S 75% SHARE

TIME PERIOD	TOTAL	MONTHLY AVERAGE
January 1976 – September 1976	$1,227,182	$136,354
July 1975 – December 1975	439,762	73,294
FY 1974 – 1975	931,174	77,598
FY 1973 – 1974	695,131	57,928
FY 1972 – 1973	929,602	77,467

The monthly average of July 1972 – December 1975 is $71,571.45, compared to the January 1976 – September 1976 monthly average of $136,353.52,indicates an increase of 90.5 percent.

SOURCE: **A First Report of the Impact of California's New Marijuana Law (SB 95), State Office of Narcotics and Drug Abuse, January 1977.**

TABLE V-7

LOS ANGELES POLICE DEPARTMENT SUMMARY OF MARIJUANA ARREST DATA FOR 1975 AND 1976*

ARRESTS	YEAR		PERCENT CHANGE
	1975	1976	
Possession of Marijuana	13,113	–	
Concentrated	–	725	
1 Ounce or less	–	7,419**	
Over 1 Ounce	–	1,093	
Subtotal	**13,113**	**9,237**	**–29.6**
Cultivation of Marijuana	892	765	–14.2
Possession of Marijuana for Sale	792	892	+12.6
Transporting/Furnishing Marijuana	328	–	
1 Ounce or less	–	9	
Over 1 Ounce	–	379	
Subtotal	**328**	**388**	**+18.3**
TOTAL ARRESTS	15,125	11,282	–25.4

*Statistics Reflect Activity Through November for Both Years.

**Includes 3,346 Citations.

Source: Los Angeles Police Department, Administrative Narcotics Division.

offenses take priority in terms of prosecution and reporting.

- Police are not as concerned with making arrests or issuing citations for misdemeanor marijuana violations and subsequently exercise greater discretion in the field.

Although marijuana arrests in Los Angeles have decreased, seizures of the drug have increased substantially. As of November 26, 1976, the police department had seized 17,427 pounds of marijuana, compared to 4,740 pounds seized during the same 1975 period. The department attributes this 268-percent increase in marijuana seizures to three major factors resulting from the change in law:

- Marijuana is now more acceptable and thus is used openly.

- Reduced penalties have fostered increases in the amounts of marijuana delivered to the area.

- Police informants are more aware of marijuana activity and are able to direct raids toward large quantities, which are increasingly the target of enforcement efforts.

However, although marijuana seizures have reportedly increased in Los Angeles, the state as a whole experienced a decrease in the total amount of the drug seized, according to the State Office of Narcotics and Drug Abuse.

One area of particular concern to the Los Angeles Police Department is the reduction in prosecution of cases involving cultivation of marijuana. A department survey of 259 cultivation cases submitted to the District Attorney's Office for filing during the first 6 months of 1976 revealed that only 25 cases (9.5 percent) were filed for cultivation. The remaining cases were filed as possession misdemeanors. The department believes that prosecutors are reluctant to aggressively pursue this type of felony case because of the change in marijuana laws.

The change of law has not created any drastic caseload problems in the Los Angeles City Attorney's Office. Even before the change in the law, almost all marijuana possession cases were being referred from the District Attorney's Office to be filed as misdemeanor cases. The majority of time spent on these cases by prosecutors in the City Attorney's Office is consumed in reviewing and screening cases before filing. After filing, defendants usually make a court appearance and pay an average fine of approximately $60, and thus prosecutors subsequently spend little time on the case. Few defendants either fail to appear in court, contest their suit, or require appointment of counsel.

In the three years prior to SB 95, over half the adult marijuana possession defendants, more than 65,000, entered a diversion program in lieu of conventional prosecution. Under the old diversion statute, a conviction record following a felony marijuana arrest was avoided. SB 95 eliminated the permanent criminal record for citation cases involving one ounce or less of marijuana. As expected, removal of this primary motive for diversion resulted in sharply decreased diversion enrollments.

However, the final amendment to SB 95 was a provision requiring the court to place a defendant with three prior marijuana convictions within two years in a drug program in lieu of a fine upon his or her fourth conviction. According to state and local spokesmen, this requirement has been difficult, if not impossible, to administer under the current arrest and prosecution system. Officers issuing citations for marijuana offenses establish the identity of persons in the field, and the defendant is merely required to appear in court and pay the assessed fine. There is no permanent identification system, since defendants are never booked and fingerprinted. If a prosecutor wished to place the defendant into a diversion program, he would have to prove three prior convictions based on existing local records. As a result, few persons convicted more than three times are sent to these programs.

Those persons charged and fined for possession of 1 ounce or less of marijuana pose an interesting legal problem to the courts if they fail to pay the fine. Normally, bench warrants would be issued for the arrest of defendants who default on their fine. Those arrested would be charged with failure to appear and confined in jail to satisfy the amount of the fine. The law, however, does not permit an arrest and confinement in these cases because the original offense, possessing 1 ounce or less of marijuana, is not a confinable offense.

FOOTNOTES

[1] Portions of this section are taken directly (with editorial modifications) from A First Report of the Impact of California's New Marijuana Law (SB 95), State Office of Narcotics and Drug Abuse, January 1977, with the oral approval of the author.

OHIO

SUMMARY

Before the 1975 Ohio law became effective, first offense possession of any amount of marijuana was punishable as a misdemeanor, and second offense possession as a felony. The recent legislation lowered the possession penalty for less than 100 grams to a minor misdemeanor punishable by a fine of not more than $100 and for 100-200 grams to not more than 30 days and/or a fine not to exceed $250. Other aspects of the recent legislation include:

- In addition to decriminalizing marijuana possession of 100 grams or less, a graduated bulk amount system is included with higher penalties for higher amounts of possession or sale.
- A provision is included that prevents the establishment of a criminal record for persons convicted of minor possession.
- The marijuana provision includes hashish and hashish oil (at different weight levels).
- The bill contains a retroactive penalty provision.
- The effective dates were November 21, 1975, for lessened penalty portions and July 1, 1976, for other portions.

The process of change began when the Attorney General of Ohio introduced an omnibus drug bill in 1974 and again in 1975 that included severe penalties for marijuana possession and sale. The marijuana provisions were considerably reduced in the legislature, and possession of less than 100 grams was decriminalized. The following factors were critical to the passage of decriminalization:

- the inclusion of the marijuana provisions in a larger bill rather than as a separate bill, so that decriminalization was not an isolated issue, and bargaining was possible;
- the existence of a highly influential and powerful supporter of decriminalization who had the resources to support his position effectually;

- the existence of decriminalization supporters in key positions in the House and Senate and particularly in the respective Judiciary Committees; and

- lack of substantial press interest in the marijuana portion of the bill, and press focus on other aspects of the bill.

With few exceptions those interviewed were supportive of the marijuana provisions of the law, although prosecution and law enforcement personnel tended to be most critical. The areas of greatest concern or confusion were the:

- retroactive penalty clause;

- decriminalized amount level;

- laboratory analysis provisions; and

- criminal record elimination provision.

Because the legislation is so new (July 1, 1976) very little impact data are available. Preliminary data indicate, however, that:

- There has been little impact on enforcement, principally police, resources in Columbus. The police still follow the normal arrest procedures of detention, fingerprinting, booking, and release rather than the optional policy to issue a citation at the time of contact. Cleveland, however, has apparently implemented a citation only process and may therefore produce enforcement savings.

- Opinions are conflicting as to the impact on prosecution and court resources. Marijuana sale and bulk amount possession cases have apparently not decreased. There is some change in misdemeanor (simple possession) cases, but its extent is unclear. All cases continue to be prosecuted, unless the amount seized is too small for laboratory analysis. Consequently, prosecutors continue to prepare for and go to court; however, since the fine is minimal, fewer defendants plead not guilty, the cases are simpler, and less time is spent in court. How much less time is not clear. Data on the corrections systems are currently being compiled and will be available shortly. Apparently, the data will indicate that the number of drug inmates has decreased.

- Health officials in Columbus report little change in health facility use. There was little diversion to treatment facilities before or after the law. Crisis contacts are said to be negligible.

POLITICAL HISTORY OF MARIJUANA DECRIMINALIZATION

Prior to 1975, Ohio had one of the strictest marijuana laws in the United States. First offense possession was a misdemeanor with up to 1 year in prison and a $1,000 fine; the second offense was a felony with a minimum of 1 year and up to 10 years imprisonment. Intent to sell brought 10 to 20 years and actual sale 20 to 40 years. The minimum penalty requirements for sale or possession with intent to sell were particularly severe and were higher than those for most other crimes in Ohio, including armed robbery, burglary, rape, voluntary manslaughter, and assault with a deadly weapon. In fact, the U.S. Sixth Circuit Court of Appeals ruled in Downey v. Perini (1975)[1] that the 30-year sentence of a man convicted of sale and possession with intent to sell a small quantity of marijuana was itself cruel and unusual punishment.

1972 Change Attempts

Although in 1972 the Ohio legislature revised the Ohio Criminal Code, drug laws were not included because, as one respondent noted, "there were already enough controversial elments to be considered." It was not until 1974 that an omnibus drug bill, HB 1090, was introduced into the legislature. The bill had been prepared by the Attorney General.

The Attorney General considered the bill to be suitably harsh on dealers and yet to provide some understanding of the problems of drug-dependent persons through a program of diversion to health facilities. Penalties for both possession and use were relatively severe. For marijuana, first offense penalties were reduced to a maximum of 6 months for possession with mandatory probation unless the court had an affirmative reason for denying probation. All other violations remained felonies, although with lesser sentences than under the previous law (see Table V-8).

HB 1090 was very popular politically, especially in the House where the bill passed easily. HB 1090 also passed most of its Senate hurdles, until it reached the Senate Rules Committee, when it failed, for a number of reasons. First, the Senate was reluctant to pass the drug bill

TABLE V-8

SUMMARY OF OHIO MARIJUANA BILLS

OFFENSE	PREVIOUS LAW	HB 1000	HB 300 (As Introduced)	HB 722	HB 300 (As Passed)
POSSESSION 1ST OFFENSE	0-1 Yr. ≤ $1,000	1st Degree Misdemeanor 0-6 Mos., ≤ $1,000 Automatic Probation If No Previous Drug Offense	3rd Degree Misdemeanor 0-60 Days, ≤ $500 Automatic Probation If No Previous Drug Offense	Minor Misdemeanor ≤ $100	<100 Gr.: Minor Misdemeanor ≤ $100 ≥100 Gr.: 4th Degree Misd. ≤ 30 Days, ≤ $250
POSSESSION 2ND OFFENSE	1-10 Years, ≤ $1,000	4th Degree Felony 6 Mos.-5 Yrs., ≤ $2,500	1st Degree Misdemeanor 0-6 Mos. ≤ $1,000		
BULK AMOUNT	–	–	90 Gr.	1,000 Gr.	200 Gr.
POSSESSION FOR SALE	1st Offense: 10-20 Years 2nd Offense: 15-30 Years 3rd Offense: 20-40 Years	1st Offense: 3rd Degree Felony 1-10 Years, ≤ $5,000 Minimum Incarceration: 1 Month 2nd Offense: 2nd Degree Felony 2-15 Years, ≤ $7,500 Minimum Incarceration: 6 Months		1-10x Bulk Amount: 2nd Degree Misdemeanor 0-90 Days, ≤ $750 10-30x Bulk Amount 1st Degree Misdemeanor 0-6 Mo. ≤ $1,000 > 30x Bulk Amount 4th Degree Felony 6 Mo.-5 Yrs., ≤ $2,500	1-3x Bulk Amount: 1st Offense: 4th Degree Felony 6 Mo.-5 Yrs., ≤ $2,500 2nd Offense: 3rd Degree Felony 1-10 Yrs., ≤ $5,000 >3x Bulk Amount: 1st Offense: 3rd Degree Felony 1-10 Yrs., ≤ $5,000 2nd Offense: 2nd Degree Felony 2-15 Yrs., ≤ $7,500
SALE	20 - 40 Years	1st Offense: 4th Degree Felony 6 Mo.-5 Years, ≤ $2,500 2nd Offense: 3rd Degree Felony 1-10 Years, ≤ $5,000		< Bulk 3rd Degree Misd. 0-60 Days, ≤ $500 1-10x Bulk and Cultivation 1st Degree Misd. 0-6 Mos. ≤ $1,000 10-30x Bulk 4th Degree Felony 6 Mo.-5 Yrs. ≤ $2,500 > 30x Bulk or Financing 3rd Degree Felony 1-10 Yrs. ≤ $5,000	<Bulk Amount or Cultivation 1st Offense: 4th Degree Felony 6 Mo.-5 Yrs., ≤ $2,500 2nd Offense: 3rd Degree Felony 1-10 Yrs., ≤ $5,000 1-3x Bulk Amount: 1st Offense: 3rd Degree Felony 1-10 Yrs., ≤ $5,000 2nd Offense: 2nd Degree Felony 2-15 Yrs., ≤ $7,500 >3x Bulk 1st Offense: 2nd Degree Felony, 2-15 Yrs.: $7,500 Minimum Incarceration 6 Mos. 2nd Offense: Same, Min. Incar. 1 Yr.
GIFT					≤20 Grams. 1st Offense: Misd. 1, ≤ $100 2nd Offense: Misd. 2, ≤ 60 Days, < $1,000

of an Attorney General who was of another party. Second, opponents of the harsh measures, particularly the marijuana portions, who had not expected the introduction of the bill, were able to exert considerable pressure on the Senate Rules Committee. Rather than risk a divisive Senate debate, the bill was permitted to die in the rules committee.

1975 Change Attempts

Early in the next general assembly (January 1975), HB 1090 was reintroduced as HB 300, with somewhat altered provisions. The marijuana penalties were again slightly reduced with first and second offense possession treated as misdemeanors, and possession of a bulk amount and sale as felonies (see Table V-8). Unlike the previous attempts, the advocates of marijuana decriminalization had assembled an effective lobby group. The major effort in this direction was made by the Governor's Advisory Council on Drug Abuse, a group that had been established under the previous administration pursuant to a federal requirement attached to the receipt of federal drug abuse prevention funds. The Advisory Council consisted of 24 members. The most active member, a prominent businessman, was strongly in favor of marijuana decriminalization, as well as the minimization of penalties and provision of treatment for drug users as opposed to drug dealers.

HB 300 had the support of most law enforcement agencies, but was opposed by groups such as the National Organization for the Reform of Marijuana Laws (NORML) that favored greater liberalization of drug laws.

A second omnibus drug bill, HB 722, was also introduced and sent to the committee. This bill was written for and approved by the Governor's Advisory Council (with a dissenting vote from the Attorney General's representative). HB 722 made all possession of less than the bulk amount a minor misdemeanor (i.e., fine only) with the bulk amount determined by the delta-8-THC (active ingredient) content of the substance involved. The bulk amount for ordinary marijuana was a kilogram (1,000 grams). since most serious traffickers dealt in kilogram bricks. This bill also introduced the graduated bulk amount concept, with higher penalties for possession or sale of ten times the bulk amount, and the highest penalties for possession or sale of 30 times the bulk amount (see Table V-8). Compared to the penalties in the existing law or in HB 300, those in HB 722 were extremely light. Because of its leniency, HB 722 was not considered by many as a politically practical bill. However, many of its provisions were transferred to HB 300, so that when the latter bill came out of the subcommittee, it was substantially more lenient. All mandatory imprisonment provisions were eliminated. The multiple bulk amount concept was included, but the actual amount reduced to 200 grams. The reduction of penalties was undoubtedly facilitated not only by the efforts of the Governor's Advisory Committee, but also by the House subcommittee, which had a majority membership disposed to support the concept.

The full House Judiciary Committee heard further testimony on HB 300. It was generally agreed that the most important testimony was that of Art Linkletter and the district attorney from Lane County, Oregon. Their testimony was arranged and financed privately and was favorable to the low penalty portions of HB 300. Mr. Linkletter was influential not only because of his national prominence, but also because of the drug-related death of his daughter, both of which attracted significant and sympathetic media attention. The Oregon district attorney was convincing because he was able to discuss from practical experience the effects of decriminalization.

With only a few minor changes, HB 300 was voted out of committee and sent to the full House where many still felt that penalties were too lenient. As a result, minimum penalties were reimposed.

Thus amended, HB 300 moved over to the Senate Judiciary Committee, where it went through a similar process. Apparently, both the Senate and the Governor's Advisory Council were not in favor of the minimum penalty concept in the House draft, but knew that a bill without minimum penalties would not achieve House concurrence. Consequently, emphasis was placed on the multiple bulk amount concept, which concept was supported by the Attorney General. Testimony before the Senate Judiciary Committee again consisted of individuals involved with marijuana at the national level, including an assistant director of the National Commission on Marihuana and Drug Abuse, and the principal author of the Consumers Union Report, Licit and Illicit Drugs. Videotapes of the testimony of Mr. Linkletter and the Oregon district attorney were presented as well as sequences of film from a drug-related national news program sympathetic to the issue. As expected, HB 300 was passed, and (see Table V-8) became effective July 1, 1976, except where sentences and penalties were less than under previous law, in which case the law became effective on November 21, 1975. Although the Governor's Advisory Council on Drug Abuse, and particularly several key members of that Council, had been active in the passage of HB 300, the Governor himself was not very involved. He did not take any active role in the bill as it passed through the legislature, and he signed it on August 22, 1975, without fanfare.

Although the media reported the legislative deliberations and their results as the bill proceeded through the legislature, there was no public campaign on the marijuana issue. Our interviews indicated that the media reported on the drug bill in its entirety rather than concentrating its emphasis solely on the marijuana provisions.

IMPACT OF THE LAW

Very little statistical data exist on the impact of the new Ohio marijuana provisions at the state level. Although the information collected by the Ohio Bureau of Drug Abuse on drug arrests is broken down for marijuana, 1976 data on a statewide basis were not available at the time of publication. Based on the study team's interviews, however, the preliminary impact of the law on law enforcement, judicial system, and health facilities is discussed below.

Law Enforcement

Interviews were conducted with state and local law enforcement specialists and officials. The Columbus Police Department does not maintain statistical records of law enforcement manhours allocated to specific areas of criminal activity such as marijuana. Nevertheless, an analysis of available data, as well as the interviews, indicate some of the probable impacts of the law on the use of law enforcement resources.

The impact in Ohio is highly dependent on the procedural approach taken by localities. For example, the Columbus police force follows a complete arrest procedure similar to that pursued under the previous law. Some suggested that the process is maintained to assure high arrest statistics, which may affect funding. However, this procedure is not mandatory. It is also possible under the law to use a citation approach in which a summons is issued at the time of apprehension, with no further police action other than confiscation of the marijuana. This procedure presumably results in a reduction of the law enforcement resources utilized in marijuana cases.

In Columbus, most of the active law enforcement effort is devoted to sales and bulk amount possession violators. Marijuana possession offenders are not actively pursued, although they are apprehended if observed unless apprehension would warn dealers of police investigation. With this exception, few possession violators are ignored by police once observed. For example, substantiation of the enforcement policy of concentrating on traffickers is found in the arrest figures for 1975 and 1976 from the Juvenile Bureaus of the Columbus Police Department (see Table V-9). Sale and possession for sale arrests have generally been more numerous than simple possession arrests.

Arrest statistics for 1976 show a 23-percent decrease in total marijuana arrests for both Columbus and Cleveland from the 1975 levels (see Tables V-10 and V-11). Statewide data are not yet available. The Columbus and Cleveland data suggest lessened police activity, although at least in Columbus the number of officers assigned to the drug law enforcement area has not been reduced. The decrease in arrests may be attributable to realigned priorities resulting from the change in law, but it is not possible to assign each causality with any certainty. Because of the complexity of daily police activity, it is also not possible to determine the actual cost or resource savings in arrest activity attributable to the law.

Police time in court may decrease significantly. Because the penalties for marijuana possession have been minimized, most defendents now plead guilty at arraignment and accept the fine which is usually about $25.00. In the Ohio system, police do not appear at arraignment, but they do in all subsequent court appearances. One estimate suggests that 80 percent of previous cases and 10 percent of current cases go beyond arraignment.[2] It is further estimated that each court appearance requires 2 to 3 hours of a policeman's time. Therefore, assuming that there is only one further court appearance, that the time required is 2 hours, and that all arrests go to arraignment, the following approximate savings can be derived:

	Previous Law (1975)		Current Law (1976)	
	Columbus	Cleveland	Columbus	Cleveland
Marijuana Arrests	1,019	729	746	559
Percent That Proceed Beyond Arraignment	815(80%)	583(80%)	75(10%)	56(10%)
Police Hours in Court	1,630	1,166	149	112

These figures are, of course, only rough approximations. Nevertheless, the calculation indicates the probability of police personnel savings under the current law.

TABLE V–9

JUVENILE BUREAU HALLUCINOGEN ARRESTS IN COLUMBUS, OHIO

TIME	SALE	POSSESSION FOR SALE	POSSESSION
1975			
Total	221	202	169
Monthly Average	**18.4**	**16.8**	**14.1**
1976			
January	15	3	0
February	21	0	14
March	18	2	15
April	8	0	12
May	26	3	18
June	39	2	16
July	39	0	3
August	22	0	5
September	28	0	11
Monthly Average	**24**	**1.1**	**10.5**

[1] These figures are for all "hallucinogens" including LSD and mescaline as well as marijuana and hashish. However, the major portion of the arrests are for marijuana.

SOURCE: Juvenile Bureau, Columbus (Ohio) Police Department.

TABLE V-10

MARIJUANA ARRESTS IN COLUMBUS, OHIO

AGE GROUP	1975	1976	% CHANGE
Juvenile (10-17)	120	56	-53
Adults			
18-24	677	518	-23
25-34	188	154	-18
35+	34	18	-47
TOTAL ADULT	899	690	-23%

Source: Columbus Police Department

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TABLE V-11

MARIJUANA ARRESTS IN CLEVELAND, OHIO

	1975	1976	% CHANGE
Total Arrests	729	559	-23

Source: Ohio Bureau of Drug Abuse.

Judicial System

In Ohio, felony cases are tried in county court and misdemeanor cases in municipal court. Therefore, marijuana cases are split between the two courts, with sale and possession for sale cases going to the county court. Generally, the number of marijuana cases has not shown a substantial change, according to the Chief of the Criminal Division of the Franklin County Prosecutor's Office. In addition, there has been little change in the method of prosecution. A check of one week's caseload showed that about 12 percent were drug cases, but most of these involved heroin or cocaine. Marijuana cases were among the lowest in incidence of all types of case before the county court.

In Franklin County, both before and after the current law, few sentences involved imprisonment, even for marijuana sale. The few defendants that were imprisoned were eligible for "shock" parole, a system of case reconsideration within 60 days of conviction. In many cases, the conviction was expunged after successful completion of probation. Thus, even under the previous strict marijuana law, a type of de-facto "decriminalization" existed. Only when the defendant was accused of multiple crimes, including offenses other than marijuana law violations, were stricter sentences given. Thus, it can be assumed there has been little change under the new law for felony cases.

In misdemeanor cases, however, the situation is different. Although prosecutors continue to prosecute every possession case, except those where the amount seized is too small to analyze, such cases rarely go beyond arraignment. Under the previous law, where there was a possibility of up to $1,000 in fines, a criminal record, and the potential for incarceration, approximately 80 percent of the arraignments were followed by further court appearance. In many cases, evidentiary hearings were held in addition to trial, because of the frequent defense tactic of submitting motions to suppress evidence. As a result, substantial court resources were used in handling marijuana cases.

Under the current law, with only the potential of a small fine and no criminal record, most defendants plead guilty at arraignment (which takes "30 seconds," according to one respondent). Preliminary approximations suggest that only 10 percent now go beyond arraignment, thus producing a substantial savings in court and prosecution resources under the new law.

Health Facilities

Interviews with health care officials in Franklin County and Columbus indicate no impact as a result of the law. No diversion program in marijuana cases has existed before or after the change in law. The number of crisis contacts at health facilities was said to be negligible.

ASSESSMENT OF THE LAW BY STATE AND LOCAL OFFICIALS

Except for some nonspecific concerns by law enforcement and prosecution officials about the nature and drafting of the statute, most interviewed during this study expressed approval of the general philosophy of HB 300, including the marijuana portion. However, several specific areas were considered troublesome, and these are briefly discussed below.

Retroactivity

The statute as passed contained a provision for the retroactive application of penalties. The major difficulty was that in many cases, where an arrest had occurred for multiple crimes, the defendant had plea bargained to a single conviction on marijuana charges. Consequently, he or she would be released from jail under the marijuana law revisions but could not, of course, be retried for the other offenses. This problem caused considerable uneasiness among criminal justice system officials during the transition period.

Amount Levels

Most law enforcement and prosecution officials felt that the 100-gram amount level was too high: too many dealers "slipped" through on charges of simple possession. These officials felt the amount should be closer to 30 grams or 1 ounce, as in most other states. On the other hand, some decriminalization proponents argued that the amount was too low; that too many small users would be caught, and that resources should be concentrated on the very high level trafficker. (There is a possibility that an amendment will be introduced in the 1977 legislative session in an attempt to lower the decriminalized amount below 100 grams.)

Laboratory Analysis

HB 300 as passed had a provision for the analysis of samples to determine the substance involved and whether it was greater or less than a bulk amount. This provision required the laboratory to save one half of the substance in question for analysis by the accused. Since passage of the bill, an amendment has been passed which allows the prosecution to close an initial independent analysis or to save a portion for the accused's personal analysis.

Criminal Record Keeping

HB 300 states that "arrest or conviction for a minor misdemeanor violation of this section does not constitute a criminal record and need not be reported by the person so arrested." There has been some disagreement as to interpretation. Criminal justice system personnel seem to feel, and it has generally been interpreted, that this section does not preclude fingerprinting and maintaining criminal justice files on the person arrested. Those who take this view feel that only reporting outside the criminal justice system, such as to insurance companies or professional schools, is precluded. Others believe that fingerprinting and all other record keeping procedures are not allowable under the law. To date, there has been no legislative or judicial clarification of this issue.

FOOTNOTES

[1] *Downey* v. *Perini*, 518 F. 2d 1288 (1975).

[2] Judge William Boyland, Columbus Municipal Court, in conversation.

TEXAS

SUMMARY

The first marijuana law in Texas was enacted in 1919, in which the transfer and sale of marijuana for nonmedical purposes were regarded as a misdemeanor offense, and possession was not listed as an offense. The marijuana laws became progressively harsh until any offense relating to the possession, sale, or delivery of marijuana was considered a felony with a penalty of 2 years to life.

In 1971, however, six bills to reduce the marijuana penalties were introduced in the House. One of these bills survived the House Criminal Jurisprudence Committee but was defeated on the House floor without a vote.

The 1973 Legislature continued, with the Governor's support, the reform movement begun in 1971. The current law was signed by the Governor on June 14, 1973, and became effective on August 27, 1973. Some of the reasons considered critical to the passage of the new law include:

- the increased use of marijuana among all socioeconomic groups, including, particularly, the affluent groups;
- support by most county prosecutors and district attorneys, because the 2-years to life penalty had become almost unworkable; and
- the fact that 48 states had already made some form of first-offense possession a misdemeanor made the "political climate" amenable to change.

The new law provides for the following penalties:

- possession of up to 2 ounces: up to 6 months in jail and up to $1,000 fine (a Class B misdemeanor under Texas law);
- possession of 2 to 4 ounces: up to 1 year in jail and up to $2,000 fine (a Class A misdemeanor under Texas law);

- possession of more than 4 ounces: 2 to 10 years in the penitentiary and up to $5,000 fine;
- casual transfers (delivery of one-fourth of an ounce or less without financial remuneration): up to 6 months in jail and $1,000 fine;
- delivery (more than one-fourth of an ounce): 2 to 10 years in the penitentiary and 0 - $5,000 fine; and
- reduction of sentence: all possession and delivery felonies could be reduced to misdemeanors at the time of sentencing, if the court felt such action would "best serve the ends of justice."

POLITICAL HISTORY OF MARIJUANA DECRIMINALIZATION

Before 1973, Texas was the only place in the United States where a person convicted of possession of marijuana could be sentenced to life imprisonment, partly because Texas law considered marijuana a narcotic between 1931 and 1973. Thus, when penalties for possession of narcotics were raised in an effort to slow the flow of drugs, the penalty for marijuana rose also. With the exception of other "narcotic" offenses, possession of marijuana was the fourth most serious offense in Texas, ranking just below rape, robbery by firearms, and murder with malice.

In 1971, House Bill 549 (HB 549) was introduced, which reduced first-offense possession to a misdemeanor and established penalties of 10 days to 2 years (the maximum for a misdemeanor in Texas) and/or fines from $25 to $1,000. Penalties for second and subsequent arrests for possession and for sale or delivery were not changed.

Five other marijuana bills were introduced in the House in 1971, and all the bills were referred to the House Criminal Jurisprudence Committee. Only the first bill was passed by the committee. However, the committee reduced jail sentences for first-offense possession from 10 days to 2 years to 7 days to 6 months, increased the minimum fine for first-offense possession from $25 to $250, and limited misdemeanor cases to cases involving 16 ounces or less. The bill was defeated on the floor of the House amid efforts to further increase the penalties of the proposed bill.

Legislative Study

In 1972, a five-person Senate Interim Drug Study Committee was created to conduct a systematic analysis of the Texas drug laws. The committee's report contained proposals which would have transformed the penalties in Texas for possession of marijuana from the nation's harshest to the nation's softest. The committee recommended decriminalization for private possession of any amount by an adult and for public possession of less than 3 ounces by an adult. Sale of marijuana and the sale, gift, or transfer of any amount to a minor, however, were proposed to remain a felony. The committee proposed reduction of the maximum felony penalty to 3 years and/or fines of up to $2,000, instead of life imprisonment with no possibility of fines.

Other marijuana penalties proposed by the committee included:

- simple possession of more than 3 ounces by an adult in public, or smoking or other ingestion of marijuana in public: misdemeanor fine with a $100 maximum (2 years to life in existing law).
- simple possession of any amount by a minor: misdemeanor fine ($100 maximum) and/or work assignment. (A delinquency charge in existing law, with the possibility of confinement in the juvenile reformatory.)
- cultivation of the marijuana plant: misdemeanor jail sentence (6 months maximum) and/or fine ($1,000 maximum) (2 years to life in existing law).

Executive Branch Proposals

Although the committee's report received a great deal of attention when the Legislature convened in January 1973, the Governor presented a bill of his own. The Governor's bill proposed that 8 ounces be the dividing line between a misdemeanor and a felony. The penalty for a misdemeanor was a maximum of 1 year in jail and/or fines of up to $2,000. If, however, a person had more than 8 ounces, then it was "presumed that the marijuana was possessed with intent to deliver it." Under this bill, a felony conviction was punishable by a prison term of 2 to 10 years--stiffer penalty than the federal maximum of 5 years for approximately the same offense, but still lower than the then existing law. The 8 ounce proposal also applied to mixtures of marijuana and other substances whose total weight was more than 8 ounces. As in federal law and most state law, the misdemeanor penalty was limited to first offenses only. Second and subsequent possession offenses of 8 ounces or less carried prison terms of 2 to 10 years and/or fines of up to $5,000.

Legislative Proposals

Two days after the Governor introduced his bill, the chairman of the Senate Interim Drug Study Committee held a press conference to announce the cosponsors of the committee's bill. The committee's bill differed from the committee proposals in only one respect: possession of heroin was a felony instead of a misdemeanor, with maximum penalties of 3 years and $2,000. In addition, the chairman criticized nearly every one of the Governor's marijuana and marijuana-related provisions. Included among these criticisms were the fact that the bill did not contain provisions for resentencing and expungement of records, nor did it distinguish between commercial distributors and small not-for-profit transfers. The bill was also criticized because it gave a law enforcement agency, the Department of Public Safety, the power to conduct drug education programs and to supervise drug research.

Compromise Legislation

The Governor's bill and the committee's bill, which represented philosophical opposites, fostered four substitutes in the House and Senate during the 1973 Legislative session. Because of the polarization, the Senate convened a conference committee to develop proposals on which both the Senate and the House could agree. The conference committee offered a fifth substitute bill, which established the cutoff point for possession misdemeanors at 4 ounces (it had been 1 ounce in the House and 8 ounces in the Senate) with the following maximum penalties:

- possession of up to 2 ounces: up to 6 months in jail and/or up to $1,000. (The House bill had the same penalty for 1 ounce, but anything over 1 ounce had been a felony.)

- possession of 2 to 4 ounces: 2 to 10 years and up to $2,000. (A felony in the House bill and a 7-day/$200 misdemeanor in the Senate version).

- possession of more than 4 ounces: 2 to 10 years and up to $5,000. (This felony penalty applied to anything over an ounce in the House bill but didn't take effect in the Senate bill unless a person had more than 8 ounces.)

- casual transfers (delivery of one-fourth of an ounce or less without financial remuneration): up to six months in jail and up to $1,000. (The House penalty was the same, and it was 7 days and $200 in the Senate version, and a felony in the Governor's original bill.)

- delivery (more than one-fourth of an ounce): 2 to 10 years and up to $5,000. (This was also the Senate penalty. After the Governor proposed 2 to 20 years, the House raised it to 2 to 90 years.)

- reduction of sentence: all possession and delivery felonies could be reduced to misdemeanors at the time of sentencing if the court felt such action would "best serve the ends of justice." (This was the House language. In the Senate bill, the reduction rested on a more specific concept--that the individual did not act "for profit or to further commercial distribution.")

Two activities listed as felonies in the House bill but not included in the Senate bill were also dropped by the conference committee: possession with intent to deliver (2 to 99 years) and delivery to a minor (5 to 99 years). In addition, the conference committee bill excluded marijuana from the definition of "manufacture," an omission that protected people who grew marijuana plants whose leaves weighed less than 4 ounces, though a person in this circumstance still was open to possession charges. The bill also included the Senate amendment stating that possession of marijuana should not be considered a crime of moral turpitude; and it agreed to limit marijuana arrests to people who possessed "a usable quantity" of the drug, a Senate provision the Governor accepted only for marijuana and not, as the Senate had intended, for all controlled substances. Senate language was deleted that prohibited a prior conviction for possession of marijuana (then a felony, now a misdemeanor) from being used as the basis for revoking or suspending a drug license held by a doctor or pharmacist.

The same pattern of accommodation extended to the rest of the provisions of the new comprehensive drug law in Texas. The House, for example, insisted that the penalties for manufacture and delivery offenses involving methamphetamines and LSD were non-negotiable, and the penalties in the final bill were 5 to 99 years, almost exactly what the Governor wanted. (In the original bill, the maximum penalty was life, as well as for most other manufacture and delivery offenses.) The substitute bill reduced the minimum for manufacture and delivery of heroin, opiates, and cocaine from 16 to 5 years, which also passed, with the maximum again being 99 years (the existing penalty was 5 years to life).

Three other provisions from the more liberal Senate version were dropped from the final bill: (1) expungement of records for first offenders, (2) the limit on inspections without warrants, and (3) exclusion from prosecution on possession and distribution charges all members of the Native American Church who used peyote in bona fide religious ceremonies(the Governor's bill had excluded from prosecution those who had more than 25-percent Indian blood). The Senate also lost what it felt was an important conceptual battle: retention of the House provision that decriminalized illegal simple possession of narcotic cough syrups. In addition, the Senate was unsuccessful in maintaining misdemeanor penalties for possession of hallucinogens or in defeating a House provision that made it illegal for pharmacists to fill narcotic prescriptions, including codeine cough syrups, 3 days after the prescription was issued.

The Senate was not without some "triumphs," however. Possession of amphetamines and barbiturates remained misdemeanors (the Governor wanted them raised to felonies), and the maximum penalty was dropped from 2 years to 1 (in part because of a general revision of the Texas penal code). Manufacture and delivery penalties for these substances stayed at 2 to 10 years and were not raised to the higher levels that the Governor recommended. Resentencing finally remained in the bill despite the ruling of the Attorney General that it represented legislative infringement on executive power. Possession of marijuana paraphernalia (smoking pipes and roach clips) was dropped as an offense, and the penalty for possession of syringes and other instruments for subcutaneous administration was reduced from a felony to a misdemeanor. In addition, before any charge could be brought in this regard, at least "a trace" of the controlled substance had to be found on the instrument, a qualification not contained in the Governor's original bill.

Finally, the bill contained some compromise provisions. The Senate succeeded in having a separate drug schedule for penalty purposes in the final bill, although LSD and methamphetamines were listed with heroin, opiates, and cocaine instead of with amphetamines, barbiturates, and the other hallucinogens, as the Senate wished. Research and education were transferred from the Department of Public Safety to the Department of Community Affairs, the quasi-cabinet agency in the Governor's office. However, registration and licensing remained with the Department of Public Safety. A liberal provision that permitted the courts to impose misdemeanor sentences on people found guilty of possession or distribution if the judge felt the individual did not act for profit or to "further commercial distribution," (which at one time had applied to all amphetamines, methamphetamines, hallucinogens, and barbiturates), was limited in the final bill to possession felonies involving amphetamines, barbiturates, and hallucinogens other than LSD.

The Senate passed the bill by a vote of 24 to 7, and the House voted 84 to 58 to accept the conference committee bill. Two weeks later, the Governor signed the bill into law on June 14, 1973, and the new act went into effect on August 27, 1973.

FEDERAL INTERPRETATION

One question remained, however; was resentencing for marijuana offenses constitutional? On October 10, six weeks after the new law went into effect, the Texas Court of Criminal Appeals ruled that it was not. In a unanimous opinion, the five-man court held that resentencing was an infringement on the powers of commutation and clemency the state constitution granted to the Governor, thereby rejecting arguments that resentencing did not interfere with these powers. (The case involved a University of Texas student who pleaded guilty in 1971 to possession of 21 pounds of marijuana and was sentenced to 25 years in prison. Under the new law, he could not have been sentenced to more than 10 years).

Three weeks later, on October 31, the same day the court refused to reconsider its ruling, the Governor asked the Board of Pardons and Paroles to review the cases of offenders who, though serving time for a marijuana possession felony, would have received a misdemeanor sentence if they had been prosecuted under the new law. However, the Governor made it clear that this request applied only where there were no other aggravating circumstances. The first seven people were not released until January 1, 1974, and a month later, 10 more were released. By May 14, 1974, 95 persons had been identified, certified as having served the maximum sentence according to the provisions of the new law, and released. But because the new drug law did not include a provision for expunction of records, the felony conviction remained a part of each person's record, even though such an act no longer was considered a felony.

ASSESSMENT AND IMPACT

Almost unanimously, those interviewed supported the provisions of the new marijuana bill. Law enforcement personnel indicated that they were in favor of the misdemeanor clauses of the law, since these provisions did not affect their efforts to pursue sale or delivery cases, which are their first priority and which remain a felony.

Prosecution personnel tended to reflect more unfavorably upon the effects of the law, because of the increased caseload in the misdemeanor courts (County Criminal Courts at Law). The shifting of a large volume of marijuana cases from felony courts (District Courts) to misdemeanor courts, without a mandatory increase in the number of courts, has caused problems in some counties and has increased plea-bargaining practices. Conversely, the shifting of these cases has reduced the caseload of felony courts, which respondents viewed as a positive effect of the law.

Table V-12 shows the total number of marijuana arrests in Texas from 1970 to 1975. During this period, marijuana arrests in Texas have increased 226 percent. This table also shows that the percentage of marijuana arrests to the total drug arrests increased so that by 1975 three out of every four drug arrests were made for marijuana offenses. According to state arrest statistics, approximately 50 percent of those arrested for marijuana offenses are 20 years of age or under.

Approximately 82 percent of the total marijuana arrests are filed as misdemeanors. During 1975, 19,427 new marijuana cases were filed in County courts in Texas, and 12,821 cases, or 66 percent, resulted in guilty pleas. During 1975, 292 persons were committed to the Texas Department of Corrections for marijuana offenses, which represents 30 percent of those committed for drug related offenses. Approximately 57 percent of those were less than 25 years of age.

The data from the criminal justice system in Texas reflect obvious increases in total activity involving marijuana offenses over the past several years. Interviews with law enforcement officers assigned to narcotics investigations in the Austin, Dallas, and Houston Police Departments indicate that:

- Little or no change has occurred in the assignment of police personnel to investigate narcotic cases.

TABLE V–12

MARIJUANA ARRESTS IN TEXAS

YEAR	TOTAL MARIJUANA ARRESTS	PERCENT OF TOTAL DRUG ARRESTS
1970	7,247	61
1971	7,819	64
1972	9,036	57
1973	19,266	79
1974	24,327	72
1975	23,602	74

- Dallas and Houston still follow the normal arrest procedures for booking and arraignment of those charged with misdemeanor violations of the marijuana laws. Since September 1975, Austin has had a department policy permitting field release for persons possessing less than 4 ounces of marijuana if, under certain circumstances, the arresting officer feels such release is warranted.

- Arrests for sale and possession of marijuana have increased in the three cities from 1972 to 1975 as follows:
    - Austin - increase of 93 percent;
    - Dallas - increase of 50 percent; and
    - Houston - increase of 59 percent.

- Although all three police departments indicated that investigative priorities were given to sale cases, responding to citizen complaints regarding persons possessing marijuana also received priority response and was taking increasing amounts of time.

- Policy for patrol officers has not changed, and officers are instructed to fully enforce all marijuana laws.

- Little discretion is exercised by the police in the filing of marijuana cases as felonies or misdemeanors. Those interviewed indicated that the 4-ounce dividing point was closely adhered to.

COLORADO

The objective of the site visit to Colorado was to document the process of change that resulted in Colorado's 1975 law eliminating incarceration as punishment for the simple possession of marijuana.

SUMMARY

Colorado's current marijuana law was passed in 1975 and became effective on July 1, 1975. Possession of marijuana remains a criminal offense; however, nonpublic possession of less than an ounce is punishable by a maximum penalty of $100. A citation-type arrest procedure is mandatory. Public display or consumption of less than an ounce is punishable by a mandatory fine of $100 and imprisonment of up to 15 days. Possession of more than 1 ounce is punishable by up to 1 year imprisonment and $500 for a first offense and up to 2 years and $1,000 for a second offense.

Penalties for sale are 1 to 14 years imprisonment and up to $1,000 for a first offense and 5 to 30 years and up to $5,000 for second and subsequent offenses. Gratuitous transfers are punished by the same penalties that apply to simple possession.

Until 1975, marijuana was classified as a narcotic drug and subject to more severe penalties than the non-narcotic drugs in the "dangerous drugs" category. The first conviction for simple possession of less than 1/2 ounce was punishable by up to 1 year imprisonment and $500, and a possession of more than 1/2 ounce was punishable by graduated penalties depending on whether it was a first, second, or subsequent offense. (These penalties are summarized in Table V-13.) As early as 1967, this classification had been questioned, but no substantial change was made. In 1973, a legalization bill was introduced that provided for state regulated (and taxed) sale. This bill was not successful.

In 1974 and 1975, the courts upheld two cases for convictions on marijuana charges, but they seriously questioned narcotic classification and urged the legislature to change the law.

In 1974, the city of Denver passed a city ordinance that reduced penalties for possession of less than one-half of 1 ounce to a maximum of $300 and 90 days in jail. The ordinance also contained a provision for a citation-type appearance procedure following arrest.

TABLE V-13

SUMMARY OF PROPOSED MARIJUANA LAWS IN COLORADO

	PREVIOUS LAW	HB 1027 (As Introduced)	HB 1027 AS PASSED HOUSE	HB 1027 AS PASSED SENATE JUDICIARY COMMITTEE	HB 1027 AS PASSED SENATE	FINAL BILL
POSSESSION	< ½ oz, 1st Offense ≤1 yr, $500 > ½ oz: 1st Offense: 2-15 yrs., $10,000 2nd Offense: 5-20 yrs., $10,000 3rd Offense: 10-30 yrs.; $10,000	<1 oz: class 2 petty offense: ≤$50 >1 oz: class 1 misdemeanor	<1 oz: ≤$100 and/or 10 days >1 oz: class 2 misdemeanor	<1 oz, ≤$100 w/ citation provision >1 oz, class 2 misdemeanor	≤1 oz: ≤$100 with citation provision 1st Offense: >1 oz: class 1 misdemeanor 2nd Offense: >1 oz: class 5 felony 3rd Offense or more: >1 oz: class 4 felony Possession with intent to sell: 3-15 years, ≤$1,000	≤1 oz: ≤$100 public display, <1 oz mandatory $100, 0-15 days 1st Offense, >1 oz or hashish 0-1 yrs. $500 2nd Offense, 0-2 yrs. $500 – $1,000
SALE	1st Offense: 10-20 yrs. 2nd Offense: 15-30 yrs. 3rd Offense: 20-40 yrs.	1-14 years, ≤$1,000				1st Offense: 1-14 yrs., ≤$1,000 2nd Offense: 5-30 yrs., ≤$5,000
SALE TO MINOR	1st Offense: Life Imprisonment 2nd Offense: Life Imprisonment or Death					
CULTIVATION	License required	License required				(without a license): 1-14 yrs., ≤$1,000
GRATUITOUS DISTRIBUTION					<1 oz: treated as possession	<1 oz: treated as possession
PUBLIC DISPLAY				Mandatory $100, 15 days	Exactly $100, ≤15 days	Mandatory $100 fine ≤15 days

In 1975, the state followed Denver's example by introducing new marijuana legislation. Three basic alternatives were debated:

- maintenance of strict penalties, including incarceration, for possession and sale offenses;
- reduction of penalties for simple possession but maintenance of a minimal judicially discretionary jail sentence (e.g., 10 days); and
- elimination of incarceration penalties for simple possession.

Those legislators who supported the first category were clearly in the minority. Most of the debate concerned the second and third types. A compromise was reached; "public" display or consumption would be punishable by a 15-day jail sentence, but no incarceration would be associated with "nonpublic" possession. The bill passed the House 36-25 and the Senate 19-16 in late spring 1975 and became effective on July 1, 1975.

Our interviews indicated that the Colorado marijuana bill passed for several reasons:

- The bill appealed to both conservatives and liberals, since both viewed it as a means for reducing government intervention into personal privacy and for diverting criminal justice resources to better use.
- The bill had the active support of influential legislators, such as the Senate majority leader.
- Testimony in favor of the bill came from responsible officials and respected members of the community, and there was little formal opposition.
- Press response was favorable, and public opposition was minimal.
- The Colorado Supreme Court explicitly questioned the clarification of marijuana as a narcotic under the prior law and threatened to find that law unconstitutional if no legislative action was taken.

- The penalty structure of the bill, particularly the differentiation between public and no public display or consumption, was designed to be acceptable to a majority of legislators.

The Colorado law has been at least partially successful in achieving the objectives of the legislature: to reduce expenditures of criminal justice system resources in marijuana cases, and to reduce the personal impact of the bill on offenders. The available data as well as subjective estimates by criminal justice system officials suggest that usage has not increased substantially, arrests have been reduced, and the length of exposure of each case to the criminal justice system has been reduced.

LEGISLATIVE AND POLITICAL HISTORY

Under Colorado law, drugs are divided into two categories: narcotic drugs (including heroin, cocaine, opium, morphine) and dangerous drugs (including amphetamines, LSD, barbiturates, and similar drugs). Possession of narcotics is generally a felony offense; possession of dangerous drugs is generally a misdemeanor. Before 1975, based on the federal example during the 1930s, marijuana had been classified as a narcotic. Concern about the appropriateness of this classification had been voiced in a 1967 legislative study. However, since there seemed to be confusion about what marijuana was, no legislative change was made:

> The Committee recommendation is that marijuana be left unchanged in the narcotic classification at least until the issue is clarified on the basis of further research by the federal government.[1]

The 1973 Attempt at Change

In 1973, several Colorado legislators attempted to change the marijuana law and introduced House Bill No. 1557, "The Marijuana Revenue Code of 1973." HB-1557 was a legalization bill which made it lawful to both use and sell marijuana. The legislative declaration attached to the bill stated among other things that:

> present laws divert police and prosecutors from action against serious crimes, overcrowd our courts and jails, and undermine respect for law and order.

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This statement summarizes what for many decriminalization supporters in Colorado was a key argument in support of decriminalization.

Under HB-1557, marijuana sellers would be licensed by the state and sales would be taxed. Up to 5 percent of the proceeds would be used to administer the law; the remainder would be placed in the old age provision fund.

As expected, HB-1557 created a furor, no one expected it to pass, and it did not emerge from the House Business Affairs Committee to which it had been referred.

Judicial Involvement

In 1974, the Courts became involved in the marijuana controversy. Four defendants who had been arrested for possession or sale of marijuana and convicted in a lower court appealed to the Colorado Supreme Court on the grounds that marijuana was not a narcotic and that therefore they should not suffer the consequences of a felony conviction under the narcotic drug laws. The Court upheld the conviction (5-2), but stated:

> We reach this result reluctantly, noting the opinion of our respected colleagues on this issue backed by respectable medical and psychological evidence that marijuana is not a narcotic and is less harmful than many drugs which result in lesser punishment. Indeed, our only measurable difference of opinion with those who dissent from the majority is our view of the role of this court as constitutional arbiter, which is well defined in our past decisions.
>
> As we are but one of three branches of government in this state, Colo. Const., art. III, we have said on more than one occasion that we do not substitute our judgment for that of the legislature.[2]

On the question of the classification of marijuana as a narcotic, the court concluded: "without an authoritative exception, those medical authorities who have examined marijuana have concluded it has no narcotic properties." As a more general statement on marijuana laws, and as a spur to the legislature, the court went on to say:

> Scientific questions aside, we are not unmindful of the impact that the continued classification of marijuana as a narcotic has on the citizens, officials and resources of this state. A felony is the most serious of crimes; a felony conviction can result in the loss of liberty and the rights enjoyed by other citizens. The integrity--and obedience--of the laws of this state, moreover, rest, in the final analysis, on the consent of the People. They cannot consent to that which they do not believe to be true, nor can they believe what has been disproven in the scientific laboratories of this country. Police conduct aimed at the thousands of persons involved in the use and dispensing of marijuana, furthermore, has often given way to overzealous police practices which endanger the right of privacy. Then, too, we are all too well aware of the heavy burden that the court and prison officials must bear to process the numerous felonies which this law precipitates. These considerations cannot be slighted by continued legislative inactivity.[3]

The Denver Revision

In March 1974, the city of Denver decided unilaterally to reduce the penalties for marijuana possession within its city limits. The impetus for the change came from the district attorney's office which felt that the current penalties were incommensurate with the severity of the offense. The new ordinance:

- reduced penalties for possession of less than one-half of an ounce to a maximum $300 fine and 90 days in jail. (State law carried a maximum $500 fine and 1 year in jail); and

- allowed for a summons citation-type procedure which, in practice, was utilized in some 20 percent of their cases.

Our interviews indicated that the ordinance has been considered quite successful by criminal justice system officials. In the year following its effective date, 1,830 marijuana ordinance violations were filed;

in most cases, defendants pleaded guilty and received a $25-50 fine, and, in some cases, a suspended 5-day jail sentence. According to a 1975 report:

> The Denver Police Department approves of the new procedure, which reduces paper work and allows concentration on more serious crimes.[4]

Although the ordinance is still in effect, it has been revised to conform to the state marijuana law that was passed in 1975.

THE 1975 LEGISLATIVE SESSION

House Consideration

In 1975, a House Bill (HB-1027) was introduced and referred to the Judiciary Committee. This proposed legislation reclassifed marijuana from the "narcotic drug" category (with severe penalties - see Table V-13) to the "dangerous drug" category, provided a $50 fine (no jail sentence) for possession of less than an ounce, and a class 1 misdemeanor penalty for more than 1 ounce. Sale penalties remained the same as for other dangerous drugs: 1 to 14 years imprisonment and up to $1,000 in fines. A provision was included that required a license for the cultivation of marijuana, with penalties for cultivation without a license identical to those for sale.

At the informal request of the Colorado District Attorney's Association, an amendment was introduced in the Judiciary Committee which increased the penalties for possession of less than 1 ounce to a $100 fine and/or 10 days in county jail. Possession of more than 1 ounce was reduced from a class 1 to a class 2 misdemeanor. The cultivation provision was eliminated, and a new provision was introduced which allowed the court to utilize treatment, probation, and deferred sentencing provisions of the law for possession of more than an ounce. This version passed the House.

Senate Consideration

Although the House was considered by media observers to be more favorable to the decriminalization concept than the Senate, incarceration for possession of less than 1 ounce was eliminated by the Senate

Judiciary Committee. The committee also introduced a citation provision that stated in part:

> Whenever a person is arrested or detained for a violation of paragraph (a) of this subsection (12) the arresting or detaining officer shall prepare a written notice, or summons, to appear in court...

Fear had been expressed by a number of legislators and law enforcement officials about the open use of marijuana in public places if all jail sentences were removed. To counter this possibility, the Senate committee included a provision for a 15-day jail sentence in addition to a mandatory $100 fine for public display or consumption.

One final aspect of the Senate bill was that a transfer of less than 2 ounces for no payment was to be treated as possession rather than sale.

Perhaps the key supporter, without whom the bill would have almost certainly failed, was the Senate majority leader, who supported the bill because he felt severe penalties for nonpublic use and possession were an unwarranted governmental intrusion into private life.

On the floor of the Senate, a number of amendments were introduced and passed. Basically, these initiated penalties for second and third convictions of possession of more than an ounce (second conviction: class 5, felony; third or subsequent conviction: class 4 felony) and added a provision for possession with intent to sell (3 to 14 years imprisonment and not more than a $1,000 fine). With these amendments, the bill passed the Senate by a narrow one-vote margin.

During this period of legislative action, the issue did not receive large-scale publicity and media coverage, and few outside experts were consulted. Most of the deliberation, including House and Senate hearings, primarily involved discussions among the legislators and members of the law enforcement community. The press reported the events, but little public reaction was in evidence. Probably the key witness at the Senate hearings was a local deputy district attorney, who was a firm supporter of the elimination of all jail sentences for minor possession. He worked closely with the legislators in the development of the bill and took part in public debate on the marijuana issue.

Alternative Legislative Position

Three positions on the marijuana issue developed. The basic supporting arguments for each included the following:

- those who supported the elimination of any jail sentence for minor possession argued that:
    - the imposition of jail sentences for private possession is an excessive governmental intrusion on personal liberty (people have the right to do as they wish in their own home);
    - the harm associated with serving time outweighs any personal harm from smoking marijuana;
    - law enforcement and justice system resources should be allocated to more important criminal activities than marijuana possession; and
    - strict marijuana possession laws engender disrespect for the entire legal system among youth.
- those who supported a minimal discretionary jail sentence (e.g., 10 days) for simple possession. This group essentially agreed with the first group but felt that minimal jail sentences:
    - would indicate the discouragement policy desired by the state;
    - would have some deterrent effect and would help prevent both increases in marijuana use and an influx of users from other states; and
    - are a minor intrusion on personal privacy and are justified by the possibility of damage to others (through potential genetic and birth defects).

- those who supported severe marijuana possession penalties argued that:
    - strict laws discourage use, particularly among youth;
    - marijuana use may lead to the use of harder drugs; and
    - marijuana may have serious harmful medical effects.

These three positions had to be resolved to agree upon a final bill. In the conference committee, the major disagreement was between those who favored the elimination of all jail penalties and those who favored the 10-day sentence.

It was at this time that the Colorado Supreme Court again questioned the constitutionality of the law's classification of marijuana as a narcotic.[5] Again, the Court reluctantly upheld the sentence; however, in a press conference immediately after the decision, the Colorado Supreme Court Chief Justice stated that if the legislature did not reform the marijuana laws, the court would indeed do so judicially.

In part, because of this threat of court invalidation of the law, the legislature agreed upon a final bill which closely paralleled the lighter penalty Senate version. In conference committee, the proponents of harsher penalties were willing to allow the fine-only penalties for less than an ounce possession, as long as stiffer penalties for sale and for sale to minors remained in the law. The final bill was passed in the House by a vote of 36-25 and in the Senate by 19-16. (See Table V-13 for a summary of the current and previous law and the major intervening bills.) The Governor had not actively supported or opposed the decriminalization concept during the legislative deliberations. He signed the bill and it became effective July 1, 1975.

IMPACT

The impact of the Colorado marijuana law on the criminal justice system is difficult to measure quantitatively for a number of reasons. First, under the old, more severe law, persons arrested for marijuana possession were frequently charged with crimes that carried lesser penalties (e.g., disorderly conduct).[6] Second, courts use a deferred judgment system, where a case is dismissed if the defendant successfully completes a probationary period. Third, statistics are

TABLE V-14

ARRESTS FOR MARIJUANA IN DENVER, COLORADO

YEAR	ADULTS	JUVENILES	TOTAL
1974	1,741	672	2,413
1975	1,018	416	1,434

SOURCE: Denver Anti-Crime Council, reported in Denver Post, June 28, 1976.

TABLE V-15

DRUG AND NARCOTIC CASES IN COLORADO DISTRICT COURTS

YEAR	OFFENSES FILED	PERCENTAGE OF TOTAL	DENVER
1973-74	2,194	22.4	669
1974-75	1,329	12.1	631
1975-76	1,070	9.8	408

SOURCE: Annual Statistical Report of the Colorado Judiciary.

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not kept specifically for marijuana for many criminal justice system functions. Finally, changes in procedure and approach did not occur simultaneously with the new law, but in many cases preceded it.[7]

Nevertheless, some preliminary conclusions can be drawn. One of the purposes of the legislation (to shift criminal justice resources from marijuana possession to other criminal justice system activities) has clearly been fulfilled, as can be seen from Table V-14, that presents arrests for simple possession of marijuana in Denver, and Table V-15, that presents drug and narcotic offenses in Colorado District Court (of which the majority are marijuana).

Table V-14 indicates a 40 percent decrease in marijuana arrests from 1974 to 1975. This decrease is substantiated by our interviews from a number of sources. For example, the Denver Police Captain, although unhappy with the moral implications of the new law, stated that it had reduced arrests and cleared up dockets.[8] According to criminal justice system officials interviewed in this study, the summons provision of the law also reduces time spent by law enforcement officials in the arrest process, although this reduction has not been quantified.

The court system has also reduced the amount of resources devoted to marijuana (see Table V-15). The Annual Statistical Report of the Colorado Judiciary commented:

> At first glance, the 2.6 percent decrease in criminal court filings this year over FY 1974-75 raises hopes that at last the growth in criminal cases over the past years has been stemmed. Closer analysis, however, reveals that the type of offenses changed drastically and for the worse. Drug offenses dropped 19.5 percent, and offenses involving fraud (predominantly bad checks) dropped 13.1 percent. In contrast, a comparison of last year's figures to this shows an alarming increase in more serious offenses: from 159 to 283 cases involving governmental operations (mostly escapes); from 4,956 to 5,357 offenses against property (an 8.1 percent increase); and from 1,624 to 1,833 offenses against persons (a 12.9 percent increase).[9]

In addition, cases that do enter the court system may take less time to process, although no statistical information was available. According to individuals involved in the judicial process interviewed in this study, more defendants plead guilty under the reduced penalties, because of the minimal penalties associated with conviction, and there are far fewer requests for evidentiary hearings (i.e., motions to suppress evidence).

There may also be a reduction of correction system resources devoted to marijuana, although again statistical information was not available. However, even before the passage of the law, only a small proportion of marijuana possession convictions involved incarceration. For example, in 1971-72, the only year for which marijuana possession data were available, only 85 of the judicial terminations resulted in sentencing to the penitentiary, reformatory, or county jail. This represented 13 percent of the 673 total convictions and 9 percent of the 963 total terminations. By definition, the number of incarcerations has been further reduced both by the fine-only provisions for possession of less than an ounce in the current law, and by the provision for summons issuance, which would reduce time spent in jail before arraignment.

FOOTNOTES

[1] Legislative Committee on Drug Abuse, Report, 1967.

[2] People v. Summit, 517 Pac. 2d 850 (1974), 183 Colo. 421 (1974).

[3] Ibid.

[4] Marijuana City Ordinance (Denver, Colorado). "Analysis of First Year of Operations," prepared by Richard Wood, Chief Deputy D. A., Denver, Colorado, May 3, 1975.

[5] People v. Bennet, 536 Pac. 2d 42 (1976).

[6] Beatrice Hoffman, Director of Planning, Development and Research, Office of the State Court Administration, in conversation.

[7] Ibid.

[8] Quoted in Denver Post, June 28, 1976.

[9] Office of the State Court Administrator, p. 72.

IOWA

SUMMARY

The objective of this case study was to investigate the recent experiences of Iowa with marijuana law, including attempts to decriminalize simple possession.

The current marijuana law in Iowa has been in effect since 1971, and it provides for the following penalties:

- possession: up to 6 months and $1,000 regardless of the number of convictions, and no amount limit is specified; the court may dismiss the case without adjudication of guilt after successful completion of probation if the individual has not been previously convicted of a dangerous substance abuse.
- sale: first offense, 5 years and up to $1,000; second offense, maximum of 15 years and $3,000.
- sale to minor: maximum 7-1/2 years and $1,000.
- cultivation: same as for sale.
- gratuitous distribution: same as for possession.

Historical Highlights

Several attempts have been made to change Iowa's marijuana laws. In 1974, a bill was introduced which would have:

- decriminalized possession for personal use (less than 1 ounce);
- decriminalized gratuitous transfers; and
- penalized public possession of more than an ounce by a maximum fine of $250.

This bill was based upon the recommendations of the National Conference of Commissioners on Uniform State Laws. The bill did not emerge from committee.

In 1976, several bills, to either decriminalize possession or minimize penalties, were introduced on the floor of the House. The two major bills would have provided a maximum $100 fine for possession of less than 2 ounces: one was a civil penalty and the other a criminal penalty. Largely because of the parliamentary maneuvering, discussed later in the Iowa study, neither bill passed. A proposed bill providing a maximum 30 days in jail and $100 was then introduced and passed the House, but because of opposition from both strong advocates and opponents of decriminalization, the bill failed in the Senate.

Iowa also passed a criminal code revision bill in 1976. Unlike other states (Ohio, Maine), however, the Iowa legislature did not use this revision as a vehicle for major change in their marijuana laws.

The basic reason why Iowa has not changed its marijuana laws is that a strong constituency for change is lacking. A study published by the Iowa Drug Abuse Authority indicates that only 10 percent of the state population over age 14 has smoked marijuana, far less than the national average of 22 percent. Furthermore, only an estimated 35 percent of the state's population feels that the "first time" possession penalty should be reduced to a fine only (although that is a substantial increase from 1974 when 25 percent held that opinion).[1] Although these figures are only indicative, they provide some idea of public opinion. Consequently, legislators do not feel substantial pressure for change, and many felt support of decriminalization would be a political disadvantage. In addition, several philosophical objections seemed prevalent:

- decriminalization represents moral degeneration;
- incarceration is needed to deter the use of a "harmful drug;" and
- marijuana use encourages experimentation with harder drugs.

Although supporters of decriminalization felt very strongly about the issue, they were neither powerful nor numerous enough to convince a majority of their colleagues.

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PROCESS OF CHANGE

Two adjacent states, South Dakota and Minnesota, passed marijuana decriminalization bills in 1976. Iowa also introduced such legislation, yet it was defeated. This section will document Iowa's experience.

Use of marijuana is proportionally less in Iowa than it is in many states, and it is less than the national average. A study released in March 1976, performed for the Iowa Drug Abuse Authority and the Iowa Crime Commission, indicated that some 10 percent of all Iowans 14 and over had used marijuana at least once during the last year.[2] Nationally, "ever users" of marijuana are 22.4 percent for youths 12-17 and 21.3 percent for adults, 18 years old and older. Also 18.1 percent of youth and 11.6 percent of adults had used marijuana within the past year.[3]

The structure of Iowa marijuana use is presented in Tables V-16 and V-17. The incidence of marijuana use may have increased slightly from 8 percent to 10 percent since an earlier (1974) similar study, although the two percent differential is within the margin of error of the two studies. As to the statistical makeup of the Iowa marijuana user, the 1974 report stated:

> "One of the significant findings involving current/regular use of marijuana from the study is that 31% of all such users are fully employed nonstudents. The study showed that very few of these users smoke on the job and that most use occurs in the privacy of one's own home or at parties. The majority of marijuana smokers, some 90%, were found to also drink alcohol, but most do not purport the use of any other illicit drugs."[4]

However, as can be seen from Table V-17, the preponderance of users are students.

The history of Iowa's marijuana laws closely parallels the history of those in other states. Iowa was the ninth state to pass anti-marijuana legislation (in 1921) and, following the federal example, increased penalties sporadically until the late 1960s. In 1969, the trend was revised, and a law was passed that reduced the penalty for simple possession from a felony to a misdemeanor with up to 6 months imprisonment and a $1,000 fine. This penalty structure was included in the Uniform Controlled Substances Act adopted by Iowa in 1971.

TABLE V-16

MARIJUANA USE IN IOWA

(1975-1976)

AGE	% OF MALES		% OF FEMALES	
	Urban	Rural	Urban	Rural
14-17	35%	23%	26%	9%
18-24	21	24	15	6
25-34	6	0	3	0
35-49	0	0	2	0
50 +	0	0	0	0
Total	13%	12%	9%	3%
Total Average Rural	7%			
Total Average Urban	10%			

SOURCE: *The Incidence and Prevalence of Substance Use and Misuse, Attitudes and Problems within Two Study Populations in the State of Iowa,* Resource Planning Corporation.

TABLE V-17

URBAN MARIJUANA USE IN IOWA

(1975-1976)

CATEGORY	% OF USERS
Employed	16
Student	26
Unemployed	5
Single	26
Married	4

SOURCE: *The Incidence and Prevalence of Substance Use and Misuse, Attitudes and Problems within Two Study Populations in the State of Iowa,* Resource Planning Corporation.

Previous bills on marijuana decriminalization have been introduced in the Iowa legislature, but did not progress very far. Perhaps the earliest such bill was Senate Bill 1180, introduced in 1974 that provided for withdrawing criminal penalties for:

- possession of marijuana for personal use (under 1 ounce was presumed to be for personal use); and
- distribution of small amount by an individual for no remuneration.

Public possession of more than an ounce, or public distribution or use, was subject to a maximum $250 fine.

THE 1976 SESSION

Iowa underwent a revision of its entire criminal code in 1976. Although the revised code has been passed, it will not become effective until 1978, thus allowing for changes and improvements as its provisions are reevaluated. However, penalties for possession of marijuana were not included in the original revised code.

The legislature also considered reduction of marijuana penalties in 1976 (see Table V-18). A bill was introduced in committee which provided a civil fine of up to $100 for possession of less than 2 ounces; possession of more than 2 ounces but less than a pound was a simple misdemeanor punishable by a $100 fine. Possession of more than 1 pound was punishable by up to 6 months imprisonment and/or a $1,000 fine. This bill did not emerge from committee.

However, because floor amendments to the Iowa Criminal Code Revision (SF-85) could be introduced, a bill was introduced (the Higgins amendment) which provided for a $100 civil citation for possession of less than an ounce, and a $100 misdemeanor penalty for possession of more than an ounce, with a provision for expungement of the latter conviction. Formal public hearings were held, and the arguments for and against decriminalization followed the pattern found elsewhere. Supporters argued that marijuana use would not increase significantly if decriminalization were passed, existing penalties are far too harsh for the harm done by use, criminal records for users are unfair, current laws divert too many resources away from more serious crimes, current laws engender contempt for all law, and the harmful effects of marijuana are not greater than those of cigarettes or alcohol. Opponents claimed that laws do discourage use, marijuana is medically harmful, use of marijuana leads to harder drugs, and decriminalization would represent a breakdown of moral principles.

The audience at the hearing consisted primarily of young people; very few legislators attended.

After the hearings, an alternate amendment (the Halverson amendment) was introduced because several representatives, although favoring a reduction in penalties, felt that decriminalization would not provide enough of a discouragement policy. The Halverson amendment was similar to the Higgins amendment, except that simple possession became a simple misdemeanor instead of a civil offense, and record expungement after 3 years was provided.

After the amendment was introduced, a parliamentary move was made to suspend debate on the Higgins bill and take up consideration of the Halverson bill. This move, it turned out, may have been critical. The Halverson amendment was defeated 44-51 because supporters of the Higgins amendment joined those who opposed all diminution of penalties and voted against it. Had the Higgins amendment been considered first and defeated, then according to some observers the Halverson amendment would have passed. When the vote was taken, however, the Higgins amendment also failed to pass by a vote of 34-60.

In an attempt to salvage some form of marijuana penalty reduction, a compromise amendment (the Brunow amendment) was introduced which treated personal possession of 1 ounce or less as a simple misdemeanor, punishable by up to 30 days in jail and/or a fine of $100. The bill also contained the 3-year criminal expungement record. Possession of more than 1 ounce was punishable by up to 6 months in prison and/or a $1,000 fine. This amendment passed by a vote of 47-40, and then went to the Senate for consideration. Organizations and individuals supporting decriminalization decided to oppose the bill for two reasons: (1) the penalties were in themselves considered unacceptably high, and (2) passage of the bill would defuse the marijuana issue and make it particularly difficult to pass future decriminalization measures. Consequently, an intensive lobby effort was mounted against the bill. Although some of the opponents of lessened penalties argued that this would be a good way to maintain some penalties, the majority of these opponents also fought the bill. As a result, the amendment failed to pass, 25-20.

Basically, the arguments for and against diminished penalties given by legislators correspond to those presented at the hearing

TABLE V-18

SUMMARY OF PROPOSED MARIJUANA LAWS IN IOWA

	CURRENT LAW	AS INTRODUCED IN JUDICIARY AND LAW ENFORCEMENT COMMITTEE	HIGGINS FLOOR AMENDMENT	HALVERSON FLOOR AMENDMENT	BRUNOW FLOOR AMENDMENT	1978 CIVIL CODE REVISION
POSSESSION	0-6 months≤$1,000	< 2 oz: civil citation ≤ $100 2 oz-1 lb. simple misdemeanor: ≤$100 ≥1 lb.: ≤ 6 mo., ≤$1,000	≤1 oz: civil citation ≤$100 >1 oz simple misdemeanor ($100) w/expungement provision	≤1 oz: non-civil, ≤$100, with 3 yr. expungement provision	<1 oz for personal use: simple misdemeanor, ≤$100, 0-30 days 3 yr. expungement, no access to records >1 oz 0-6 hrs., ≤$1,000	(NONE)
SALE	1st Offense: 5 yrs., ≤$1,000 2nd Offense: 0-15 yrs., ≤$3,000					Class D felony for delivery or attempted delivery
SALE TO MINOR	0-7½ years $1,000					Class C felony
CULTIVATION	0-5 yrs., ≤$1,000					
GRATUITOUS DISTRIBUTION	Same as Possession					

which was previously discussed. However, one particular concern frequently mentioned was the alleged illogic of eliminating penalties for use, while at the same time providing penalties for sale. This problem was not resolved and remained a conceptual stumbling block.

Legislators were also sensitive to the attitudes of constituents. The Iowa Drug Survey mentioned earlier included an attitudinal survey on a number of marijuana questions (see Table V-19). Most respondents felt there was "something wrong" with smoking marijuana, that marijuana was more harmful than cigarettes or alcohol, and that possession penalties should not be reduced to a simple fine. However, substantially more people agreed and less disagreed with the last statement in 1976 than in 1974. In addition, in response to the question, "What do you consider the best way of preventing drug abuse?", only 33 percent and 29 percent of rural and urban residents, respectively, felt a stricter law enforcement policy was the solution, whereas 54 and 53 percent felt that more treatment and educational programs were the best approach. Furthermore, although some supporters had been apprehensive about the political aspects of their position, statements by legislators who had supported decriminalization and who ran for reelection in the recent election indicated that their position on marijuana was not an issue in their campaigns. Generally, these positions had not been raised by either party, even in those elections where the race was extremely close. By implication, the marijuana issue was not perceived by legislators as an important one to the voters.

The Governor had not played an active role in the Iowa debate on marijuana decriminalization. He had supported and been influential in including reduced penalties for the possession of marijuana in the 1971 Uniform Controlled Substances Act adopted by Iowa. During the 1976 deliberations, he stated publicly that he did not support the Higgins amendment which provided for a $100 maximum civil citation penalty for possession of less than 1 ounce, and gave as a reason the apparent inconsistency between a noncriminal approach to possession while maintaining a criminal approach to sale. One of the Governor's assistants stated that the Governor as general policy wishes the legislature to develop its own legislation and decides on any bill on its particular merits when it reaches his desk.

As was found in other states, the media were not considered by those interviewed to have been a highly influential factor in the

TABLE V-19

RESULTS OF IOWA DRUG SURVEY

- *There is nothing wrong with smoking marijuana as long as a person does so in moderation.*

	1974		1976	
	Rural	**Urban**	**Rural**	**Urban**
Agree	11%	14%	9%	21%
Disagree	85%	80%	75%	62%
Not Sure	4%	6%	16%	17%

- *Smoking marijuana is no more harmful than smoking cigarettes or drinking alcohol.*

	1974		1976	
	Rural	**Urban**	**Rural**	**Urban**
Agree	28%	32%	23%	26%
Disagree	52%	46%	44%	46%
Not Sure	20%	22%	33%	27%

- *The penalty for "first time" possession of marijuana should be reduced to an offense punishable by a fine.*

	1974		1976	
	Rural	**Urban**	**Rural**	**Urban**
Agree	21%	30%	33%	37%
Disagree	66%	50%	43%	41%
Not Sure	13%	19%	24%	21%

SOURCE: *The Incidence and Prevalence of Substance Use and Misuse, Attitudes and Problems within Two Study Populations in the State of Iowa*, Resource Planning Corporation.

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decriminalization debate. The media reported the legislative deliberations but did not mount an extensive public campaign either in support of or in opposition to the decriminalization concept.

FOOTNOTES

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[1] Iowa Drug Abuse Authority, " Incidence and Prevalence of Substance Use and Misuse, Attitudes and Problems Within Two Study Population in the State of Iowa, " 1976 Resurvey.

[2] Ibid.

[3] Nonmedical Use of Psychoactive Substances, NIDA, Dept. of HEW, 1976.

[4] Intercom, Iowa Drug Abuse Authority, Vol. 5, No. 1, Jan. /Feb. 1975.

LOUISIANA

SUMMARY

The objective of this case study was to investigate the recent experience of Louisiana with marijuana law, including attempts to decriminalize possession. Louisiana's current marijuana law has been in effect since 1972, and includes the following provisions:

- possession:
    - first offense, a maximum of 6 months and $500 fine;
    - second offense, a maximum of 5 years and $2,000 fine; and
    - third or subsequent offense, a maximum of 20 years.
- distribution:
    - first offense, a maximum of 10 years and $15,000 fine; and
    - second offense, a maximum of 20 years and $30,000 fine.
- distribution to a minor: a maximum of 20 years and $30,000 fine.
- cultivation: a maximum of 10 years and $15,000 fine.

Several attempts have been made by members of the Louisiana legislature to decriminalize simple possession of marijuana; until 1976, none of these bills has emerged from committee. In 1976, another amendment to the marijuana law was introduced to change the penalties for possession. As voted out of committee, this bill called for:

- a misdemeanor (criminal) penalty of $200 (maximum) for possession of less than 1 ounce;
- a mandatory citation provision if proof of identity and promise to appear was given; and

- no criminal record.

Although this bill had the support of the Attorney General, the majority of the Senate considered it unacceptable. A floor amendment that added a maximum 30-day prison sentence was introduced and passed, but the full bill then failed in the Senate by a 9-30 vote. A compromise bill was introduced on the floor that provided the following incremental penalties for possession of less than 1 ounce:

- first conviction: a maximum of 10 days and $200 fine;
- second conviction: a maximum of 30 days and $400 fine; and
- third conviction: a maximum of 6 months and $1,000 fine.

This bill was opposed by both supporters and opponents of the decriminalization concept and thus failed in the Senate by a vote of 10-29.

In spite of the strong support of the Attorney General and the lack of formal organized opposition, the majority of legislators considered support of decriminalization to be a political liability. A poll showed that 55 percent of Louisiana voters strongly disapproved of abolishing all possession penalties; only 11 percent favored such an abolition. (However, it is important to note that the poll only assessed voter reaction to the concept of abolishing all penalties for possession, not the concepts of penalty reduction and civil fines.) In addition, opponents held the conviction that incarceration penalties for possession were successful in inhibiting use, particularly among the young. The opinion was also widespread that judicial discretion was being properly exercised in current sentencing practices and that there was therefore no need to restrict that discretion.

POLITICAL HISTORY

Because Louisiana borders on the Gulf of Mexico, the state (and particularly New Orleans) has been an important landing place for individuals from Mexico and the Carribean who brought cannabis with them. Although Louisiana was only the 15th state to pass an antimarijuana law (in 1924), medical and law enforcement officials were influential in the formation of the first federal marijuana law. Before 1924, marijuana could be obtained without a prescription from pharmacies and on the open market.

The progression of marijuana laws in Louisiana has since followed the same pattern as federal and other state laws. Penalties increased in severity until the late 1960s, when marijuana laws began to be reassessed. The latest change was in 1972 when the penalty for the first conviction for marijuana possession was reduced from 1 year in the state penitentiary to 6 months in the parish prison. In 1972, a proposal was introduced (House Concurrent Resolution 106) to create a joint committee to study the feasibility of legalization or decriminalization of marijuana. This proposal was defeated by a 56-26 vote. Three other bills were introduced in 1972 on the decriminalization issue but did not progress beyond the committee stage.

STATE USAGE PATTERNS

Statistics are not available for the number of marijuana users in Louisiana. However, one expert estimates that among young people, 30 percent use it regularly and another 15 to 20 percent use it sporadically.[1] Although drugs provide only a small portion of total arrests made in Louisiana (2 percent and 4 percent, respectively, in 1974), they nevertheless represent a sizeable investment of criminal justice system resources. In 1974, the last year for which data were available, a total of 9,983 offenses were reported, and 16,076 arrests were made for all drug law violations (44 arrests per day). Of all drug arrests, 33.5 percent were for marijuana possession (another 13.7 percent were for marijuana sale or cultivation). The data also show that 21.1 percent of all marijuana possession sentences involve actual confinement, and that the average sentence length for marijuana possession is slightly over 6 months. Approximately 73 percent of all persons in correction facilities on drug charges are there for possession of marijuana and only 0.1 percent for sale of heroin (see V-20).

In 1976, a number of senators and representatives from the New Orleans area introduced marijuana decriminalization legislation. These legislators felt that current marijuana laws were too severe, placed too great a burden on youthful experimenters who were "not really criminal," and utilized too large a proportion of criminal justice system resources. One bill was introduced in the Senate (SB 421) and one in the House (HB 659). These bills, and subsequent

TABLE V-20

MARIJUANA ARRESTS IN LOUISIANA

	Offenses Reported		Persons Arrested		Distribution Rates of Judicial Dispositions				Drug Sentences Distribution			
		% Total Drug		% Total Drug	% Guilty Plea	% Jury Trial	% Awaiting Trial	% Other	% Confinement	% Probation	% Fine	% Other
MARIJUANA	6,426	64.4	7,595	47.2	85.3	1.1	4.3	4.3	26.3	42.0	7.1	24.6
Manufac./Distrib.	1,863	8.7 (29)	2,207	13.7 (28.1)	14.1	0.7	1.0	0.7	5.2	5.1	0.4	1.5
Possession	4,563	45.7 (71)	5,388	33.5 (70.9)	71.2	0.4	8.3	3.6	21.1	36.9	6.7	23.1

	DRUG SENTENCES SEVERITY DISTRIBUTION									Marijuana Offenders as Percent of All Drug Offenders in Corrections System
	CONFINEMENT[1]			PROBATION[1]			FINES			
	Avg.	High	Low	Avg.	High	Low	Avg.	High	Low	
Marijuana										
Manufac./Distrib.	02-10-17	10-0-0	0-02-0	02-05-08	06-0-0	0-0-10	235	500	100	7.3%
Possession	00-06-27	10-0-0	0-0-06	0-08-26	05-0-0	0-0-06	279	750	50	73.1%

Source: 1974 Crime Statistics Report of the Attorney General of Louisiana.

[1] Figures expressed in years-months-days.

TABLE V-21

SUMMARY OF PROPOSED MARIJUANA LAWS IN LOUISIANA

	PRESENT LAW	HB 659; SB 421 (As Introduced)	SB 421 (As It Passed Committee)	DUVAL FLOOR AMENDMENTS TO 421	E BARHAM FLOOR AMENDMENTS TO SB 421
POSSESSION	1st Offense: 0-6 mo., $500 2nd Offense: 0-5 yrs., $2,000 3rd and Subs.: 20 yrs max.	≤1 oz: $100 civil fine summons only otherwise same as present law	≤1 oz: ≤$200 (misdemeanor) summons only otherwise same as present law Committee Vote: 4-3	≤1 oz: ≤$200 and/or 30 days otherwise same as present law Amend. Passed 19-18 Bill Failed 9-30	1st Conviction: ≤$200, 10 days 2nd Conviction: ≤$400, 30 days 3rd Conviction: ≤$1,000, 6 mo. Non Public Record Maintainable Max. of 5 yrs. Bill Failed 10-29
DISTRIBUTION	1st Offense: 0-10 yrs., $15,000 2nd Offense: 0-20 yrs., $30,000				
SALE TO MINOR	0-20 yrs., $30,000				
CULTIVATION	0-10 yrs., $15,000 Same as Distribution				
GRATUITOUS DISTRIBUTION	Same as Distribution				

changes, are summarized in Table V-21. Both bills related to possession of marijuana only and did not cover sale or cultivation. House Bill 659, which provided for a civil fine of less than $100 for possession of less than an ounce and the issuance of a summons rather than the formal arrest procedure, was not passed by the House Committee on the Administration of Criminal Justice. Senate Bill 240, which provided for a $100 criminal fine for the first conviction only but did not contain the summons provision, died in the Senate Judiciary Committee.

SB 421 provided for a $100 civil penalty for possession of less than an ounce and retained the summons-only provision of HB 659. Hearings were held on this bill by the Senate Judiciary Committee. Testimony was given primarily by state and local officials. The District Attorney for East Baton Rouge Parish (one of the more populated districts in the state) and the coroner of Orleans Parish (in which New Orleans is located) testified against decriminalization. They argued that the drug was potentially dangerous, lessening penalties would cause increased use, and decriminalizing possession while maintaining criminal penalties for sale was illogical.

A New Orleans psychiatrist and head of the New Orleans and Louisiana State Mental Health Committees of the medical society spoke in favor of the bill. He argued that evidence showed few, if any, seriously harmful mental effects and that a prison experience and criminal record were too great a punishment for youthful experimenters.

Perhaps the most outspoken proponent of the SB 421 was Louisiana's Attorney General. He stated that the legal scheme had proved ineffective in curtailing the use of marijuana and caused a misallocation of criminal justice resources. He stated further:

> I believe that experience has shown that more harm than good is produced by jailing and criminalizing individuals who make the misjudgement of possessing or using a small amount of marijuana.

He then departed from his written statement and spoke of the harm that can come from a criminal record and of the disrespect for the judicial system bred by the law. He also criticized the diversion of criminal justice system resources away from other crime to marijuana cases, and in doing so cited the marijuana arrests and confinements previously presented in Table V-20. So forceful was the Attorney General's testimony, that proponents of the bill decided to rest their case and did not call a Colorado Deputy District Attorney, even though he had been flown from Aspen specifically to testify at the hearing.

After the conclusion of the hearings, the Judiciary Committee made changes in SB 421. The maximum fine was increased from $100 to $200. In addition, the offense was changed from a civil violation to a misdemeanor to maintain the procedural specifications associated with the criminal law. However, a provision was added which stated that "an apprehension or conviction for such violation shall not constitute a criminal record for the purposes of any administrative or private inquiry." In this form, SB 421 was reported out of committee to the floor of the Senate by a vote of 4-3.

The bill received quite a bit of attention on the floor (one senator obtained an ounce of marijuana from the police department and exhibited it to the other legislators). Concern was expressed that the bill would signal approval, increase usage particularly among school-aged youth, and eliminate judicial discretion on the imposition of sentences. A provision was introduced to substantially increase penalties for possession to a maximum of 30 days and to delete the summons-only enforcement and the elimination of criminal records provision. The sponsor introduced the amendments in the hopes that the bill would be killed altogether. The amendments narrowly passed, 19-18. The author of the original bill then returned the bill to the calendar. Three weeks later, a compromise was attempted, and the bill was recalled from the calendar for reconsideration. The compromise measure provided for the following maximum penalties:

- first conviction - $200 and 10 days;
- second conviction - $400 and 30 days; and
- third conviction - $1,000 and 60 months.

Under this compromise, a private, nonpublic record would be maintained for no more than 5 years. The compromise was defeated 10-29. The amended bill was then voted upon and failed 9-30. As a result, no change was made in the current law.

In summary, supporters of the bill argued that:

- Current laws are unfair, and they penalize only random offenders, including young people who may be only experimenting with the drug.
- Current laws allow for geographically inequitable enforcement. For example, in New Orleans the usual sentence is a small fine plus court costs. In Cameron parish, three youths who had one-half joint between them pleaded guilty to "attempted" possession and were sentenced to 45 days.[2] Although statistics were not available, a number of respondents, including the Attorney General, felt that the laws were unevenly enforced.
- Current laws divert too many criminal justice system resources away from "more serious" crimes.
- Marijuana use has been proven to be relatively harmless.
- Current laws are too great an infringement on personal liberty.
- Current laws do not discourage personal use, and decriminalization has not been shown to cause an increase in use elsewhere.
- Current laws engender disrespect for all law.

The opponents argued that:

- The proposed law could encourage use, while the current law is a deterrent.
- Marijuana is physically harmful enough to justify the intrusion of the law into personal privacy.
- Marijuana leads to harder drugs.
- The current law provides criminal justice system with a useful maneuvering tool (for plea bargaining and other negotiations).

- Even if adults should be allowed to do as they please, strong laws are needed to discourage use among youth.

- First offenders or possessors of small amounts are usually given light sentences under the current law, therefore there is no need for change.

In addition to these reasons, the opponents of the bill felt that it would be politically inappropriate. Louisiana is generally considered a conservative state, and although none of the legislators reported a strong public reaction to their positions, a 1975 poll by the Baton Rouge Morning Advocate indicated that 55 percent of Louisiana voters "strongly disapprove of abolishing all penalties for possession of marijuana for personal use." Only 11 percent favored such abolition. The age breakdown in that poll:[3]

Age	"Strongly Favor"
18-29	19%
30+	9%

Note that the poll did not assess public opinion on the question of decriminalization but only on abolishment of all penalties. In addition to undertaking the poll, the Louisiana media gave the marijuana issue high visibility during the legislative debate, featuring frequent articles on the bill's progress. Editorially the majority of major newspapers favored decriminalization, although this position was not universal throughout the state.

The Morning Advocate also undertook a more recent poll (January 1977) which is not directly comparable to the 1975 poll because of differences in the question asked. This time the poll inquired whether voters favored or approved "a bill to legalize smoking of marijuana." The results of the poll showed:[4]

Position	Percent
Favor	13
Oppose	70
Makes No Difference	12
No Opinion	5

Note that again, the question concerned legalization, not decriminalization. Marijuana was a visible issue in the Attorney General's campaign for reelection. The incumbent Attorney General's opponent frequently and publicly criticized the former's strong public statements in favor of decriminalization, including his legislative testimony. Nevertheless, in spite of the apparent public opposition to decriminalization cited in the Morning Advocate polls and the high visibility given the issue by his opponent, the incumbent won and did not perceive his position on the marijuana issue to have been politically harmful.

Supporters of the bill feel certain that a decriminalization bill will be reintroduced in the next meeting of the legislature, although they believe the prospects for passage are less certain.

The Governor of Louisiana did not take a public position on marijuana during the legislative debate, and did not attempt to influence the outcome in either direction. Since that time he has indicated in an interview in a weekly newspaper that he does not oppose the decriminalization approach. He stated:

> I think there is too much made about the simple, occasional use of it (marijuana). While I would not support legalizing the traffic of it, I don't think that the hue and cry against the people who are caught with a couple of cigarettes is justified. No more than I would say that if a person were caught with a fifth of Jack Daniels, that he should be sent to prison.[5]

FOOTNOTES

[1] Dr. Kenneth Ritter, Chairman of the Mental Health Committee of both the New Orleans and Louisiana Medical Society. Reported in *Baton Rouge State-Times*, June 15, 1976.

[2] In Louisiana, an "attempted" offense is usually punishable by one-half the sentence of the offense itself.

[3] Baton Rouge *Morning Advocate*, January 11, 1975.

[4] Baton Rouge *Morning Advocate*, January 20, 1977.

[5] *Gris Gris*, Vol. 4, No. 15, Oct. 19-26, 1976, Baton Rouge.

MAINE

SUMMARY

The 1975 Maine legislature substantially reduced penalties for possession and sale of marijuana. Possession of marijuana is now punishable by a civil fine of $200 or less. Possession with intent to sell is a criminal offense punishable by up to 1 year incarceration and a fine of up to $500. An individual can be charged with either possession or possession with intent to sell, depending on the circumstances and regardless of the amount; however, possession of more than 1-1/2 ounces is presumed to be with intent to sell. The law contains a mandatory citation provision for all simple possession cases, unless there is probable cause that the suspected violator is furnishing improper identification. There is no distinction between first and subsequent offenses. A summary of the penalties associated with the current and previous Maine marijuana laws is provided in Table V-22.

The decriminalization of marijuana possession in Maine was passed as part of an overall revision of the Maine criminal code. The Criminal Code Revision Commission began work in April 1972, and established a separate committee for work on the drug laws. In 1973, however, marijuana legislation was passed (independently of the Commission's activity) which eliminated higher penalties for second and subsequent possession offenses and penalties for knowingly being in the presence of a person in possession of marijuana. The legislation also established possession with the intent to sell as a separate offense.

In 1975, the Commission recommended a penalty structure that provided a $100 civil fine for possession of any quantity of marijuana. The Joint Committee on the Judiciary held hearings on the Commission's recommendations. Subsequently, the committee added a provision to distinguish between possession of less than and more than 1-1/2 ounces of marijuana to satisfy those who felt that otherwise possession of large amounts obviously intended for sale would be decriminalized. A separate provision for minors under 18 was also added to the bill to conform to Maine's juvenile code, although the penalties were essentially the same. The bill was passed by the committee unanimously. On the floor of the House, three alternate amendments were introduced, one of which was less stringent than the Judiciary Committee's bill, and two of which were more stringent. The alternatives were defeated, and the committee version passed by a voice vote. The entire Criminal Code Revision passed the House 123-10, and then passed the Senate without debate.

TABLE V-22

SUMMARY OF PROPOSED MARIJUANA LAWS IN MAINE

	1969	1973	PROPOSED CRIMINAL CODE	CRIMINAL CODE AS ADOPTED
POSSESSION	1st Offense: max. $1,000, 11 months 2nd Offense: max. $2,000, 2 yrs.	11 months, $1,000	Civil Fine: up to $100. citation provision	Civil Fine: $200 Hashish: 0-1 yrs., ≤ $500
POSSESSION WITH INTENT TO SELL		Same as trafficking		0-1 yrs., ≤ $500 (Intent to sell presumed for > 1½ oz.)
TRAFFICKING OR FURNISHING	1st offense: max. 5 yrs., $1,000 2nd Offense: 2-10 years, $1,000	SAME		Marijuana: 0-1 yr., $500 Hashish: 0-5 yrs., $1,000
SALE TO MINOR (Under 16)				Marijuana: 0-5 yrs., $1,000 Hashish: 0-10 yrs., $10,000
GRATUITOUS DISTRIBUTION				Furnishing; same as trafficking
OTHER PROVISIONS	Possession penalties for being "knowingly in presence of use"			

Implementation of the law appears to have been reasonably successful. However, some members of the Maine Police Chiefs Association, who continue to be strongly opposed, have threatened to initiate a public referendum to reinstate criminal penalties and will almost certainly have legislation introduced in the next session to that effect. Legislators interviewed in this study indicated that such a bill is not likely to pass.

POLITICAL HISTORY OF MARIJUANA LEGISLATION

Maine, like many other states, has passed through a series of penalty reductions for marijuana offenses. In 1969, first offense possession was reduced from a felony to a misdemeanor (up to 11 months in jail and/or up to a $1,000 fine). In 1973, higher penalties for second offenses (up to 2 years and $2,000) and possession penalties for anyone found knowingly in the presence of persons in possession of marijuana were eliminated entirely. A separate provision was also added in 1973 which made the penalties for possession with intent to sell similar to those for sale.

Three marijuana bills were introduced in 1973, one of which involved legalization of possession. Hearings were held in which the director of NORML, the former deputy director of the Federal Bureau of Narcotics, and a pediatrician and member of the Georgetown University faculty testified in favor of the bill. However, the legalization bill was unacceptable to a majority of legislators, and although the bill was reported out of the Judiciary Committee,[1] it was changed by the House to a decriminalization bill. The decriminalization bill was supported by editorials from the state's major newspapers but failed to pass the House by a vote of 78-47.

Criminal Code Revision

The Maine Criminal Code Revision Commission, which began work in April 1972, formed a separate working subcommittee to evaluate the drug section of the code. Most of the work of the commission took place in executive sessions with no press or public admitted.

Commission Recommendation

Originally the Commission considered the abolition of all penalties for private possession of marijuana (as recommended by the National Commission on Marihuana and Drug Abuse), but members of the Commission felt such a bill would not pass. The Commission therefore recommended a $100 maximum civil fine for possession of any amount for the first of any subsequent offense, which, as part of the entire criminal code revision, was approved in 1975.

A primary rationale for the decriminalization approach was that it encouraged proper use of criminal justice system resources. In its introduction to the proposed code, the commission stated:

> The Commission has been keenly aware that the penal law can become, and in some respects already is, badly over-extended. When the law reaches such a state it tends to squander precious and limited social assets such as law enforcement and court resources....Thus one of the tasks involved in defining crime has been to identify these cases and to restrict the law to instances where enforcement is to be encouraged, and the prohibitions to be taken as representative of community judgements that are widely and strongly held. In the course of making decisions of this sort the Commission has recommended dropping from the penal law those prohibitions that do not meet these criteria, including the prohibition against use of marijuana for one's personal use.

The press particularly emphasized the marijuana provision of the proposed code. One government official familiar with the history of the code estimated that 80 percent of press coverage of the code concerned the marijuana issue. Because the Commission had recommended decriminalization, the concept carried considerable weight in the legislature. However, the Judiciary Committee evaluated the entire code, and one member was assigned responsibility for organizing the study of the drug provisions. The committee held hearings on the marijuana issue and invited national figures. Almost all testimony supported the decriminalization concept, and the testimony was influential in convincing a majority of the legislators of the validity of the decriminalization approach. Some legislators expressed concern over the health effects of marijuana, but they were impressed by the apparent success of decriminalization in Oregon, the arguments advocating better use of criminal justice system resources, and the personal and social harm to young experimenters caused by maintaining strict marijuana laws.

Although some members of the Judiciary Committee remained opposed to the decriminalization concept, the committee approved decriminalization of possession of less than 1-1/2 ounces ($200 civil fine), with criminal penalties for possession of more than 1-1/2 ounces and for sale. (The provision passed unanimously, which had a substantial impact on the full House. The support of conservative members of Judiciary Committee defused the opposition of conservative members of the House.)

Nevertheless, there was opposition to the decriminalization provision on the floor of the House, and alternative amendments were introduced. Those who wished to offer amendments had been asked to submit their material in advance to drafting in accordance with the other provisions of the code. Proponents of decriminalization were therefore aware of the alternatives and arranged to have a legalization amendment introduced so that the decriminalization amendment would represent a middle ground; and allowed those who did not wish to appear too lenient to vote against the legalization bill. (The four amendments considered, as well as the original commission proposal, are summarized in Table V-23).

The legalization provision was defeated 122-11, as were the other alternatives. The committee version was approved by a voice vote, and the entire criminal code was later passed in the House by a vote of 123-10.

Although the media had spotlighted the marijuana deliberations in the legislature, and although some legislators had anticipated public response to the decriminalization activity, none of the legislators interviewed reported receiving substantial amounts of mail in response to their position, although they did report some letters both pro and con.

MAJOR PROCESS OF CHANGE FACTORS

On the basis of extensive interviews in nine states, relative to the experience in other states, Maine passed marijuana decriminalization legislation in an atmosphere of deliberation in which positions on both sides of the issue were formulated objectively and without hysteria. The legislation succeeded because a majority of legislators believed that (1) extensive devotion of criminal justice system resources to marijuana possession was a misuse of those resources and (2) criminal penalties for simple possession were an unwarranted intrusion on person privacy, particularly when much of private use was simply youthful experimentation.

TABLE V-23

MARIJUANA BILLS INTRODUCED DURING THE 1975 MAINE LEGISLATIVE SESSION

Maine Criminal Code Revision Commission:

Civil fine, up to $100, for possession of any quantity, and for 1st or any subsequent offense.

Judiciary Committee:

Civil fine up to $200, for possession of any amount for personal use.
Possession of more than 1½ ounces is presumed to be with intention to sell; penalty: up to 1 year and $500.
For those under 18: juvenile offense, fine of up to $200.

Amendment A:

Legalization of private use for adults.
For public use, same as judiciary committee.

Amendment B:

Possession of any amount: criminal fine of up to $500.
Arrest record expunged after one year.

Amendment C:

Possession of up to 1½ ounces: up to one year in prison and a fine of $500.
Possession of more than 1½ ounces: up to 5 years and $1,000.

However, a number of other aspects of the legislative process are noteworthy:

- Decriminalization of possession was part of a large-scale revision of the criminal code, which involved the review of medical, social and statistical data on marijuana. The marijuana provisions were not obscured by consideration of the overall code, however, since these provisions probably received more attention in the legislature than any other single item in the criminal code, and since a number of alternatives to decriminalization were proposed. Nevertheless, our interviews indicated that the bill may have had substantially more difficulty passing if it had been an entirely separate bill.

- Testimony before the Joint Committee on the Judiciary was professionally presented and convincing to many legislators. Especially important was the testimony of a District Attorney from Eugene, Oregon who discussed successful experiences with decriminalization, and a doctor from Harvard Medical School who felt that marijuana was less harmful to an individual than exposure to the criminal justice system.

- The legislators who favored decriminalization took an active role in passage of the bill, rather than a role of passive support.

- Supporters of the decriminalization bill arranged to have a legalization amendment introduced on the floor of the House, which allowed legislators fearful of constituent reaction to report that they had voted against a legalization measure.

- There was no substantial organized opposition.

In Maine, the process of marijuana law change was almost completely legislative. Except for input by the Criminal Code Revision Commission, members of the judiciary and/or the executive staff made little contribution. No government agency took a position, although the Maine Office of Alcoholism and Drug Abuse Prevention played an important and influential role in serving as a conduit for information for the state legislature. At least one member of that office unofficially advocated the decriminalization approach.

Although the Governor had made some informal remarks regarding the potential health hazards of marijuana, he did not take a policy position and signed the full criminal code bill on June 18, 1975, which became effective on May 1, 1976.

Since the bill's passage, the Maine Chiefs of Police Association has been lobbying for a return to more stringent marijuana laws. The association has threatened to initiate a public referendum calling for criminal penalties for marijuana possession. However, such a referendum involves a lengthy and expensive signature gathering process, which has not been initiated to date. The association also had legislation introduced in the 1976 legislature. Maine's procedural rules, however, do not allow the introduction of legislation in a special (alternate year) session that has already been considered in the previous year's regular session. A similar bill will almost certainly be introduced in the 1977 session, although its chances of passage are not good: legislators interviewed perceive the current law as satisfactory to a majority of legislators and the public.

IMPACT OF CHANGE

Because Maine's marijuana decriminalization bill has been in effect only since May 1, 1976, the impact that the bill will have is not yet determinable. An assessment of the impact is also complicated by the fact that prosecution policy had changed before the effective date of the law. For example, an assistant district attorney in the Portland area indicated that the number of cases had already decreased by the fall of 1975, and that these cases were frequently "filed on costs." (A system in Maine in which the defendant pays a court fee and, although the complaint remains pending, in practice further action is almost never taken so that in effect charges are dropped.)

In 1973, the Maine Office of Alcoholism and Drug Abuse Prevention (then the Commission on Drug Abuse) conducted an attitude and opinion survey of police chiefs, sheriffs, county attorneys, and district court judges. The survey was taken to "lessen the information gap between the criminal justice system and legislative draftsmen and state governmental policy-makers."

The survey found that:

- a majority of police and sheriffs believed that marijuana use leads to hard drugs, while only a minority of county attorneys and judges believed so.

- a majority of police, sheriffs, and county attorneys believed that marijuana use causes loss of motivation, while only a minority of judges believed so.
- a majority of police believed that marijuana use causes aggressive behavior, while only a minority of the others believed so.

Regarding the deterrent effect of the current marijuana laws, only a minority of all officials felt that those laws deterred casual, experimental, or regular use or not-for-profit transfer. The study obtained interesting results on the question of alternatives to the current law. Only a minority of sheriffs, county attorneys and judges favored a permanent arrest or conviction record for possession of marijuana, and a majority of all groups favored the reduction of possession penalties and maintainance of heavy penalties for sale. However, a majority of county attorneys also favored legalization.

Comprehensive data on marijuana usage patterns in Maine are not available. Because Maine is largely a rural state, lower levels of use might be expected than in the nation as a whole, but subjective estimates are highly variable, and no clear consensus on levels of use emerges.

Arrest records for marijuana are also incomplete. In 1973, marijuana arrests totalled 1,802,[2] and in 1975 they totalled 1,650,[3] showing little change, although it is unclear whether this is because of a lack of change in usage patterns or a change in enforcement posture. Marijuana arrests constitute by far the largest percentage of drug arrests in Maine (89.1 percent of juvenile drug arrests, 86.1 percent of adult drug arrests in 1975), and by far the largest percentage of these are for possession. Figures specifically for marijuana are not available for 1976. Total drug violations, including marijuana, for the first 6 months of 1976 were 182 for sales and 593 for possession, for a total of 775. For the months July - December 1976, there were 111 violations for sale and 496 for possession of all drugs. Violations for the second half of 1976 (the law became effective May 1, 1976) therefore fell 16 percent for possession and 39 percent for sale from the levels of the first half of 1976. Total drug violations for 1976 (1,382) decreased 27 percent from the 1975 level (1,895).

In spite of the lack of data, subjective estimates indicate a decrease in criminal justice system resource use since the passage of the new criminal code. For example, an informal telephone poll, taken in conjunction with this study, of Assistant District Attorneys from the major Maine population centers indicated that a substantially lower number of cases was reaching the prosecutors office. A Portland assistant county attorney was aware of only 5 or 10 marijuana cases processed since the effective date of the law, and of only one in which guilt had been contested. This was considered a much lower number than under the previous law, although statistics from earlier years were not available. The other district attorneys reported a similar decrease.

FOOTNOTES

[1] In the Maine system, a single minority vote in Committee will allow release of a bill to the floor.

[2] Federal Bureau of Investigation Uniform Crime Report.

[3] Maine Criminal Justice Planning and Assistance Agency.

MINNESOTA

SUMMARY

Minnesota's current law governing the sale and distribution of marijuana became effective on April 10, 1976. The major provisions of that law include:

- possession of less than 1-1/2 ounces:
  - first offense - a possibility of a mandatory 4- to 8-hour education course and a $100 fine; and
  - second and subsequent offenses within two years - 0 to 90 days, a $300 fine, and mandatory participation in chemical dependency diagnosis.
- possession of more than 1-1/2 ounces:
  - first offense - 0 to 3 years and a $3,000 fine; and
  - second and subsequent offenses - 0 to 5 years and a $5,000 fine.
- sale:
  - first offense - 0 to 5 years and a $15,000 fine; and
  - second and subsequent offenses - 0 to 10 years and a $30,000 fine.
- distribution to a minor: 0 to 10 years, and a $15,000 fine.

Cultivation is treated in the same way as sale, and there is no separate provision for public use. Gratuitous distribution of less than 1-1/2 ounces is treated as possession.

Minnesota has undergone a number of successive reductions in its marijuana laws in the last half decade. In 1972, the penalty for simple possession of less than 1-1/2 ounces was reduced from a felony to a gross misdemeanor (up to 1 year and $10,000). In 1973, the simple possession (less than 1-1/2 ounces) was again reduced to a maximum of 90 days and $300.

In 1973, decriminalization legislation that imposed civil penalties for possession was introduced but passed neither the House nor the Senate. However, provisions did pass that required simple misdemeanors and mentioned participation in a drug education program at the discretion of the court.

Between 1972 and 1975, a campaign was mounted by citizens in favor of decriminalization. The Minneapolis Tribune conducted polls and ran a major multipage article on marijuana. The Minnesota State Alcohol and Drug Authority, Department of Public Welfare, commissioned two studies on usage patterns, one of which was published in 1973 and the other in 1975.

In 1975, House File 749 and Senate File 505 were introduced. These bills made possession a petty misdemeanor with first offense punishable by a maximum fine of $50 and participation in a drug education program. A second offense within 2 years was punishable by a fine of up to $100, and a third and any subsequent offenses within 2 years remained a gross misdemeanor. Failure to comply with the provisions of the law was punishable as a misdemeanor, but subsequent compliance was an absolute defense.

Hearings were held over a period of 2 years with extensive testimony, and the bills were carefully engineered from a political point of view. For example, supportive debate was given by rural conservatives rather than urban liberals to enhance the bills' credibility. The bills were passed in their current form, with only first-offense possession of less than 1-1/2 ounces or distribution thereof for no profit a noncriminal penalty. Participation in a drug education program was required.

Because an extensive effort was undertaken to inform judges, law enforcement officials, and others of the nature of the new marijuana laws, the law has generally been well-accepted and smoothly implemented. The educational program is used by 1/2 of the state's 114 courts.

Only citation procedures are authorized by the statute, although there were initially some arrests depending upon the jurisdiction. Arrests have decreased subsequent to the new law. One estimate indicates that Minnesota may be saving some $3.5 million annually as a result of the law.

POLITICAL HISTORY OF MARIJUANA DECRIMINALIZATION

Minnesota has gone through an evolutionary change in marijuana penalties. In 1972, the 1957 Narcotics Control Act (based upon the federal model carrying felony penalties) was amended to provide that possession and distribution of small amounts of marijuana (less than 1-1/2 ounces) be punishable as a gross misdemeanor with penalties of up to 1 year and a $10,000 fine. This act was partly in response to a state supreme court decision upholding a felony conviction and a long-term sentence for an individual whose pockets had been vacuumed, detecting one-10,000th gram of marijuana. The number of marijuana arrests had increased sharply from less than 250 in 1968, to nearly 3,000 per year in 1972. Although by 1973 all marijuana possession arrests had reached approximately 3,600, convictions were less than 500 and of these only about 6 percent were given confinement as a disposition.[1] This high level of diversion suggests that de facto decriminalization was already occurring for a large number of cases. In addition, the number of arrests varied geographically, and the greatest number of arrests were of younger Minnesotans.

In 1973, the legislature further reduced penalties for small amounts of marijuana to a simple misdemeanor with maximum penalties of 90 days and a $300 fine. Small amounts were defined as up to 1-1/2 ounces, or about 20 to 30 marijuana cigarettes, which was assumed to be an amount for personal use. Sale of marijuana remained a felony.

Considerable ground work for legislative action was laid by an active and effective advocate and lobbyist, who, in addition to his background as an attorney and pharmacist, was associate director of the University of Minnesota's Drug Information and Education Program (now Office of Alcohol and Other Drug Abuse Programming). In 1972, he introduced and obtained approval for a resolution by the Hennepin County (Minneapolis) Bar Association to make simple possession a petty misdemeanor. Subsequently, a state bar committee recommended reduced penalties and the state bar concurred. The State Public Health Association, Medical Association, and Nursing Association adopted similar resolutions.

The Governor supported the reduction to a simple misdemeanor but not the reduction to a petty offense. In the legislature, a bill was introduced in the House and the Senate specifying civil penalties for first offense possession of 1-1/2 ounce in any one year of $50, and second offense in any one year of $100. Misdemeanor penalties for sale were proposed for the first sale in any one year and gross misdemeanor penalties for second and subsequent sales. The House and Senate did not accept the reduction to civil penalties but did settle on simple misdemeanor criminal penalties. The Governor did not support the original legislative proposal, and many legislators were concerned about the health considerations and the idea that marijuana users would progress to harder drugs.

Major Education Alternative Specified

A new idea, however, was included in the 1973 legislation. The legislation provided that "any person convicted under this section of possessing small amounts of marijuana and placed on probation, may be required to take part in a Drug Education Program, as specified by the Court." From this point forward, education became the keystone to passage of marijuana decriminalization in 1975.

Despite the fact that decriminalization failed, supporters of reduced penalties were encouraged by the public and organization support in the 1973 legislature. The supporters prepared a strategy for the 1975 legislative session which included:

- providing information to the public and government to allay fears of the unknown and lay a factual base for the legislation;
- legitimizing decriminalization by portraying national advocacy and decriminalization trends;
- obtaining new legislative sponsors;
- obtaining effective testimony for legislative committees; and
- developing the educational alternative as an operational concept.

Media Coverage

A number of research, educational, and public information efforts were undertaken from different perspectives. The Minneapolis Tribune conducted extensive surveys of public attitudes regarding marijuana in 1972 and 1974. These surveys indicated that one-third of Minnesota's adult population thought that there was social acceptance of the use of marijuana. Older respondents believed the drug to be fairly harmful even when used in moderation, whereas the majority of younger respondents believed that moderate use is not harmful.

The Minneapolis Tribune also published in September 1974 a major in-depth article, under the byline of their senior science writer/editor. The article described the medical/scientific controversies surrounding use of marijuana, national trends in reducing marijuana penalties, usage levels, and the rising number of arrests of young people in the state for marijuana possession.

State Studies

The Minnesota State Alcohol and Drug Authority (Department of Public Welfare), the state's official agency charged with helping the citizens of Minnesota face problems of recreational chemical use was concerned about what it saw happening under the old law, and the variable treatment of offenders by the police and courts, but did not take an early stand for decriminalization. It, however, did commission two research works that contributed to public information. In 1973, a comprehensive incidence and prevalence study was conducted regarding the use of illegal drugs within the state. The study determined that 12.5 percent of the adult population, or 341,966 individuals, admitted using marijuana in violation of the law, and that 6 percent, or 153,201, were using marijuana on a consistent basis.

The authority also contracted with the Minnesota Behavioral Institute, a nonprofit charitable research organization, to study and report on the use of marijuana in Minnesota. The institute's executive director was an advocate of the educational alternative. The institute's report, published in early 1975 during the legislative session, was useful during the legislative hearings. The report stated that Minnesotans were using marijuana extensively, and that there was little if any indication of potential public health problems or endangerment of the social structure, based upon the viewpoints of representatives of area mental health centers and school districts. The report also documented national scientific information and the evolution of the Minnesota criminal justice system's response to recreational marijuana use. In a nonadvocacy fashion, the report attempted to document existing conditions.

1976 LEGISLATIVE PROPOSALS

The legislative sponsors in the House and Senate drafted House File 749 and Senate File 505 to reduce penalties from a simple misdemeanor to the following:

- petty misdemeanor for first offense punishable by a fine of up to $50 and participation in a drug education program at an area mental health center (with a curriculum approved by the state Alcohol Drug Abuse Authority);
- petty misdemeanor for second violation within 2 years punishable by a fine of up to $100 and participation in chemical dependency evaluation and treatment, if necessary; and
- misdemeanor for third and subsequent violations within 2 years with potential requirement of participating in medical evaluation.

The legislation also provided that keeping more than 1/20 ounce of marijuana within the passenger compartment of an automobile would be punishable as a misdemeanor. This provision was in keeping with Minnesota's "open-bottle law," which prohibits alcohol in the passenger compartment.

Finally, the legislation prohibited local governments from adopting ordinances with stronger penalties for marijuana use than the state. Under Minnesota legal definitions, a petty misdemeanor is not a crime. The record of a petty misdemeanor is nonpublic and kept only to establish whether an offense is the second or more within 2 years. Access is limited to the courts.

To assure compliance, the legislation provided that individuals willfully and intentionally failing to comply are guilty of a misdemeanor. However, subsequent compliance would be an absolute defense for such a misdemeanor charge. The purpose of this provision therefore was to force compliance.

Hearings

Hearings were first held in the House Committee, and subsequently the Senate. Considerable care was taken as to how the bill was handled. The authors were the House and Senate leadership, generally conservative members. Those giving testimony were a mix of recognized practical knowledgeable people, both national and local. The testimony began with the deputy director of the National Commission on Marihuana and Drug Abuse, who provided a general overview of the commission's findings, and related how the members started out against decriminalization and changed their minds during the course of the commission's study. Medical doctors representing local and state medical societies reassured the legislature that the critical medical evidence was not sufficient to impede decriminalization. Police chiefs testified that enforcement of marijuana laws was an improper use of resources which could be used more productively on serious crimes. A district attorney of Eugene, Oregon, testified that their experience with decriminalization had been good, with no significant increase in usage and a very significant tax savings. In addition, a former Deputy Director of the Bureau of Narcotics and Dangerous Drugs and Federal Bureau of Narcotics testified that marijuana problems are exaggerated.

A St. Paul psychiatrist did warn the committee, however, that medical evidence was inconclusive and indicated the existence of "fringe" studies of medical risk, and stated that marijuana use produced an amotivational syndrome. The State Bureau of Criminal Apprehension was opposed to the bill and attempted to organize the opposition.

The educational requirement was highlighted as a vehicle to direct the attention of individuals using marijuana to the personal risks of chemical abuse in general. The idea of educating young people about what they were getting into, rather than putting them in jail, was persuasive.

Legislative Debate and Passage

Following approval by the committee, the floor debate in the House was critical. The floor advocates were well-briefed conservatives from rural areas; the urban liberals were silent. After spirited debate, the bill passed the house easily.

One senator tried to organize opponents of the bill in the Senate into a block which would force retention of the misdemeanor (criminal) penalties while providing for an educational program as an additional penalty. That senator failed in his efforts to block passage of the bill but he did succeed in arousing diagreement, and the bill only passed by a few votes in a more restrictive version, making the second offense in 2 years a misdemeanor.

Skepticism about the education requirement was visible. The Senate bill added an evaluation requirement, in which the State Alcohol and Drug Authority was mandated to evaluate and report during each legislative session on the effectiveness of the education program. In conference committee, the Senate version won, with penalties of a petty misdemeanor and a $100 fine for the first offense, and with subsequent offenses within 2 years a misdemeanor.

Legislators and political journalists indicate that the bill passed for the following reasons:

- The middle class and establishment became advocates because the risks to their children of incarceration and and its attendant societal and psychological damage were felt to be of greater danger than the drug iteself.
- The educational idea was widely respected as an alternative to incarceration.
- The bill handling strategy was well-organized.
- There was credible support for decriminalization.
- The belief was widespread that the courts had already decriminalized possession in most cases.
- The experience of the state with reduction of penalties in 1971 and 1973 was positive.
- Proponents had presented the more convincing testimony to the legislature.

The Governor's Position

The Governor was publicly ambivalent about the bill during the legislative process but apparently did little if anything to stop its passage. Upon passage, he announced that he had grave reservations to resolve before he could sign the bill. The Governor was reportedly concerned about the political repercussions of signing the bill and stated that he needed to get further information to assure himself that the legislation was sound. This initiated a "lobby" with a loud and vigorous push to get the Governor to sign it. Upon signing the bill, the Governor stated that his reservations were satisfied. The Governor's staff ventured that this was done to reassure the people of the state about the bill.

Although there was substantial press and media coverage of the legislative process, little public pressure was evident either for or against decriminalization (with the exception of the organized lobby pressure on the Governor to sign the bill). Interviews with elected officials indicated that it was not a significant issue in the 1976 legislative campaign. The major sponsors of the bill in both the Senate and House were reelected.

ASSESSMENT OF THE LAW

Except for some objections by law enforcement personnel and continuing doubts about the efficacy of the educational alternative, state and local officials interviewed are reasonably satisfied with the bill that passed and think that it is workable legislation. The decriminalization advocates, however, would like the misdemeanor penalty removed for offenses subsequent to the first within a 2-year period. Some in the police community believe that decriminalization of marijuana is symptomatic of a permissive society, which is causing problems for the police and the law-abiding public.

State officials are pleased with the pace of the implementation of drug education as a penalty alternative, the acceptance by the judges of the educational programs, and the extensive participation by area mental health boards in conducting the education programs.

One issue that is now pending before the Supreme Court of the State of Minnesota is whether an officer has the right to conduct a search if he suspects marijuana to be present. The District Court held that an officer has such a right. This decision is being appealed under the Fourth Amendment on the basis that possession is not a crime and the law has no provision for arrest, and therefore a search is illegal.

IMPACT ASSESSMENT

At the state level, the Alcohol and Drug Authority (Department of Public Welfare) was mandated to implement the education requirement of the act. The authority and its contractor, the Minnesota Behavioral Institute (MBI), have successfully established acceptance by judges of the educational program, achieved agreement by all county area mental health boards to deliver the service, and developed a curriculum and set of acceptable instructors for the program. Although judges may make a finding that an individual need not go to an education program, they must state reasons; it is generally considered easier to send people to the sessions, and most marijuana cases are in fact so diverted.

Before revision of the statute, local vice and narcotic squads were not consistent in pursuing possession cases, but were primarily after the big dealer in multiple drugs. Since the change in the statute, law enforcement personnel are, if anything, less actively pursuing marijuana possession, unless it is a means of reaching a big dealer. Possession is usually discovered in the process of a traffic violation or in responding to a noisy house call.

Complete data are not available on the proportions of local police departments that issue a citation, such as are used in traffic incidents, versus those that go through a limited or full booking procedure. St. Paul and other metropolitan police issue field citations and book and fingerprint suspects only if they cannot sufficiently identify themselves. Those booked are nearly always released on their own recognizance. Amounts in possession are rarely weighed by police, unless the person appears to be selling. For felony cases, however, complete laboratory procedures are observed.

In 1975, before decriminalization, the number of arrests was 4,409. Based upon current trends, 2,500 citations are expected per year under the new law. A Minnesota Behavioral Institute study indicates that the average police officer time per arrest is 37.7 minutes which, for a two-person patrol car, involves a unit cost of $26.96. In contrast, the issuance of a traffic citation requires approximately 7 minutes, or a unit cost of $5.04 per a citation. The MBI study therefore concludes that police costs of over $100,000 would be saved per annum if the citation process was used exclusively by police officers and courts.

The study also estimates potential savings in court and corrections costs of more than $500,000. This figure is based upon an extrapolation from a fairly extensive and rigorous investigation of the costs of public drunkenness processing. It of course assumes a number of similarities between marijuana and public drunkenness cases.

Finally, the study assumes an approximate savings of $2.9 million in drug therapy costs. This estimate is based upon the federal estimate that 19 percent of chemical dependency monies are directed toward marijuana users, and the assumption that 70 percent of these costs would be curtailed by the institution of the drug education program. The current education program, in contrast, will cost approximately $100,000 in its first year, and the budget for the second year is less than $70,000. Subsequent programming will be entirely self-sufficient (funded by program participant fees).

These estimates are approximate and, of course, the assumption may not be completely valid. The study admits that the limited available data preclude a definitive cost savings projection. Nevertheless, the data indicate estimated savings of some $3.5 million[2] by the change from the previous system to the current decriminalized/educational system.

FOOTNOTES

[1] Source: State Alcohol and Drug Authority, Minnesota Department of Public Welfare, The Use of Marijuana in Minnesota, April 1975.

[2] Bomier, Bruce, "Projected Cost Disparity for Dispositions," Minnesota Behavioral Institute, unpublished memorandum.

NEW JERSEY

SUMMARY

Under the current New Jersey marijuana statute, the Controlled Dangerous Substances Act of 1970, possession of less than 25 grams of marijuana (5 grams of hashish) is punishable as a disorderly person offense with up to 6 months of imprisonment and a $500 fine. Possession of more than 25 grams is punishable by up to 5 years of imprisonment and a $15,000 fine. A second or subsequent offense is punishable by up to twice the penalty for a first offense. Penalties for sale are the same as those for possession of more than 25 grams. The full penalty structure of the New Jersey marijuana law is summarized in Table V-24.

Since 1970, reports and recommendations have been issued by executive, judicial, legislative, and criminal justice agencies and organizations regarding marijuana. A number of unsuccessful attempts have been initiated to change the law. A decriminalization bill recently defeated in the legislature would have penalized possession of less than 28 grams by a fine of $50 for each offense. Possession of 28 to 56 grams would have been a criminal offense punishable by up to 6 months imprisonment and $500. Possession of more than 56 grams would have been punishable by up to 5 years of imprisonment and a $15,000 fine.

The most notable actions on the marijuana issue in New Jersey include:

- In 1970, the State Supreme Court ruled that a 2- to 3-year sentence for a first conviction of possession was excessive and that first offense sentences should be suspended.[1]
- In 1971, the Appellate Division of the New Jersey Superior Court held that a 2- to 5-year sentence for possession and sale was too strict for the circumstances of the case.[2]
- In 1973, the New Jersey Department of Law and Public Safety issued a report recommending fine-only criminal penalties for simple possession.[3]

TABLE V-24

SUMMARY OF CURRENT AND PROPOSED MARIJUANA LAWS IN NEW JERSEY

	CURRENT LAW	N.J. DRUG STUDY COMMISSION	STAMLER MODEL[1]	DIVISION OF CRIMINAL JUSTICE (A.G.)	SB 1461 (1974) AB 1544 (1976)
POSSESSION	≤25 gr. (5):[†] ≤6 mo., $500 >25 gr. (5) ≤5 yrs., $15,000 2nd Offense: twice penalty	≤28 gr. (6): ≤$50 fine 28-56 gr. (6-12): ≤6 mo., $500 >56 gr. (12) ≤3 yrs., $1,000	≤10 gr. (1):[*] ≤$100 fine 10-25 gr. (1-5) ≤6 mo., $500 >25 gr (5) ≤5 yrs., $1,500	Civil Fine:[*] ≤$200	<28 gr. (6)[*] ≤$50 28-56 gr. (6-12) ≤6 mo., $500 ≥56 gr. (12) ≤3 yrs., $1,000
SALE	≤5 yrs., $15,000	≤28 gr. (6): ≤3 yrs., $1,000 >28 gr. (6): ≤5 yrs., $1,500		≤5 yrs., $15,000	≤28 gr. (6) ≤3 yrs., $1,000 ≥28 gr. (6) ≤5 yrs., $1,500
SALE TO MINOR (by someone >18, to another at least 3 yrs. junior)	twice sale penalty				
CULTIVATION	≤6 mo., $500	same		personal use: ≤$200 – (civil) other: ≤6 mo., $500	
GRATUITOUS DISTRIBUTIONS	No Separate Provision				
OTHER PROVISIONS				comprehensive review after 3 years	comprehensive review after 3 yrs.

[†] nos. in parenthesis indicate grams of hashish.

[*] citation provision.

[1] N.J. Narcotic Officers Association.

- In 1974, the legislature's Drug Study Commission recommended the decriminalization of possession of less than 28 grams.

- In 1974, a statewide poll indicated that 20 percent of the population of New Jersey over the age of 18 had used marijuana.

- In 1974, decriminalization legislation was introduced but did not emerge from committee.

- In 1974, a report of a Committee of the New Jersey Narcotics Enforcement Officers Association recommended decriminalization of possession of less than 10 ounces. However, the full association adopted a resolution opposing decriminalization in any form.

- In 1975, bills for the decriminalization of marijuana were introduced and emerged from committee but did not reach a floor vote.

- In 1976, the Attorney General's office issued a report supporting decriminalization.

- In 1976, a constitutional challenge to the New Jersey marijuana law was initiated. The case has been appealed to the New Jersey Supreme Court and is now pending.

- In 1976, legislation was introduced to decriminalize possession of less than 28 grams. Through a parliamentary maneuver the bill was nearly killed but emerged on the floor of the Assembly and was subsequently defeated.

The history of marijuana legislation in New Jersey is unusual. A number of major governmental institutions with some relationship to the drug field (e.g., the legislature's Drug Study Commission, the Office of the Attorney General) have recommended decriminalization, except for the New Jersey Narcotics Officers Association, which specifically opposes decriminalization.

HISTORICAL PERSPECTIVES

New Jersey's current marijuana law, in effect since 1970, reduced the penalties for possession to:

- $600 fine and 6-month maximum imprisonment for possession of less than 25 grams;
- $15,000 fine and 5-year maximum imprisonment for possession of more than 25 grams;
- twice the above penalties for a second offense; and
- $15,000 fine and 5-year maximum imprisonment for sale.

Even in 1970, however, concern was expressed about the appropriateness of incarceration as a first-offense penalty for possession of marijuana. In October 1970, the New Jersey Supreme Court (New Jersey's highest court) ruled in State v. Ward (57 N.J. 75, 1970) that sentences for first offenders in such cases should be suspended. This decision acted essentially as a directive to lower court judges. Less than a year later, in State v. Brennan (115 N.J. Super. 401, 1971), the New Jersey Superior Court reached a similar conclusion, even though in this case the defendant had been charged with sale of marijuana.

In 1973, the Division of Criminal Justice of the New Jersey Attorney General's office conducted a study of the New Jersey drug laws. In addition to performing its own research, the division interviewed criminal justice officials in New Jersey. The division recommended the abolition of amount levels and the reduction of penalties for personal use to a disorderly persons offense (technically, a noncriminal offense in New Jersey) punishable by a maximum fine of $500. Court appearances were unnecessary under this recommendation. The division concluded:

> There is strong support for the view that possession of marihuana and hashish for personal use should no longer be subject to criminal penalties.[4]

The Drug Study Commission

The New Jersey legislature did not act on the division's recommendations in 1973, but set up its own study group (known as the "Drug

Study Commission") which was mandated, among other things, to "study the need for revising criminal penalties concerning the possession and/or use of marihuana and hashish." The Commission presented its first report to the legislature in October 1974.

The Commission's first recommendation read as follows:

> 1. RECOMMEND, that the penalties for the unlawful possession of marihuana or hashish, pursuant to P.L. 1970, c. 226, § 20 (C.24: 21-20 a. (3)), should be decriminalized in the following manner. The Unlawful possession of 28 grams (1 ounce) or less of marihuana--which includes any adulterants or dilutants thereof--or 6 grams or less of hashish would be considered a nuisance offense, subject to the confiscation of the marihuana or hashish, and a $50.00 fine payable without a court appearance through a procedure similar to non-moving traffic violations. The unlawful possession of less than 56 grams (2 ounces) and more than 28 grams (1 ounce) of marihuana, or the unlawful possession of less than 12 grams and more than 6 grams of hashish, would be considered a disorderly persons offense, subject to not more than 6 months imprisonment, a fine of not more than $500.00, or both. The unlawful possession of more than 56 grams of marihuana or more than 12 grams of hashish would be considered a misdemeanor, subject to not more than 3 years imprisonment, a fine of not more than $1,000.00, or both.

Penalties for distribution would be punishable by:

- less than 3 years and a $1,000 fine for sale of less than 28 grams; and
- less than 5 years and a $1,500 fine for sale of more than 28 grams.

The commission's conclusions on the nature of marijuana, its use, and its relationship to New Jersey Law, included:

1. Marihuana does not pose a serious threat to the user or society.

2. Marihuana has become a popular and accepted form of recreation for a large segment of the national population, including residents of New Jersey.

3. The present policy of criminalizing marihuana use in New Jersey has failed to act as an effective deterrent and has engendered various social adversities.

4. The societal costs of attempting to enforce the existing New Jersey anti-marihuana statutes, in light of medical knowledge and public expectation, far outweigh the possible benefits which may be derived from the continuation of such a policy.

5. In order to alleviate the social adversities emanating from our present marihuana policy, and to provide a rational and enlightened social policy, in light of medical knowledge and public expectation, marihuana legislation reform is needed.

As a result of the Drug Study Commission's conclusions, decriminalization legislation was introduced in November 1974, basically following the Commission's model. In December 1974, the Eagleton Institute of Rutgers University conducted a statewide poll which indicated that approximately 19 percent (950,000 individuals) of the residents of New Jersey age 18 or older had used marijuana. A slight majority (51.46 percent) opposed the decriminalization effort, which was a lower margin than the results of a similar poll taken 2 years earlier in which 56 percent were opposed.

At this time, a special committee of the New Jersey Narcotics Enforcement Officers Association also recommended the decriminalizing possession of up to 10 grams of marijuana. The full Narcotics Officers Association, however, voted in October 1974 to adopt a resolution opposing marijuana decriminalization in any form.

Recent Activity

Hearings on the 1974 bill were not held until March 1975. Testimony in support of the bill was given by both the state Attorney General and by the State Department of Health. However, a substantial amount of the testimony was opposed to decriminalization. The most discussed topic was the possibility of harmful medical effects resulting from marijuana, and the testimony was not in agreement on this subject. Supporters of decriminalization also cited the harmful effects of jail sentences on young people and the general antagonism toward the law caused by incarceration penalties for marijuana use. Opponents of the bill, in addition to the potential for physical harm, cited the possibility of increased traffic accidents and the disinclination to initiate a trend toward legalization.

The decriminalization bill was passed by the committee, but died in the full Assembly without a vote.

In 1976 a new bill was introduced that was almost identical to the 1974/1975 bill. Again, the bill emerged from the Assembly Judiciary Committee; however, one member of the Assembly Committee was not consulted and immediately had the bill sent to the Conference Committee, which is not an active committee in New Jersey. Although the bill was again presumed defeated, it was reintroduced on the Assembly floor in November 1976 and was scheduled for a vote in December. The bill was soundly defeated on the Assembly floor.

During 1976, the Attorney General's office issued another report favorable to decriminalization.[5] The Attorney General continued to emphasize the position that amount levels should be distinguished and that all personal possession for private use should be decriminalized. The Attorney General also recommended that prosecutor or jury should use its discretion as to whether possession was with intent to sell. On the question of amount levels, the report stated:

> The advantage of clarity and certainty is achieved with some compromise of the principle that possession for personal use is not a serious threat. The firm quantity limitations go beyond the "presumption" built into the amendments drafted by the Conference on Uniform Laws and beyond the open ended measure proposed by the Division of Criminal Justice. Such an artificial device may facilitate criminal

> conviction of those possessing greater quantities of the substances, but it only roughly approximates the real intent of the possessor.

In 1976, the marijuana law was challenged in the courts.[6] The defendant argued that the law represented a violation of the rights of privacy and equal protection and constituted cruel and unusual punishment. The case failed in the lower courts and is on appeal to the Supreme Court.

The Governor has not taken an active role in the marijuana debate, although as noted earlier, the Health Department and the New Jersey Department of Law and Public Safety (part of the Attorney General's Office) did support decriminalization.

The press during this period was objective: it printed news items on the legislative deliberations and on the positions of key individuals, but did not take a unanimous position on the issue.

USAGE PATTERNS

New Jersey has experienced a substantial growth in marijuana use over the last decade. By 1974, the poll conducted by the Eagleton Institute of Rutgers University cited earlier indicated that 19 percent (950,000 individuals) of all residents of the state over the age of 18 had used marijuana. Use was highly age specific:

Age	% of Age Group Who Have Ever Used
18 - 20	76
21 - 29	46
Over 40	3

Approximately 65 percent of those who have used marijuana said they would use it again, while only 4 percent of those who had not used it said thay would consider its use if it were completely legalized. The implication is that individuals make their usage decisions on the basis of factors other than the status of the law.

In spite of the heavy usage patterns indicated by the study, a slight majority still opposed decriminalization (51 percent opposed, 46 percent in support). These attitudes represented a change from a poll taken 2 years earlier by the Eagleton Institute in which 56 percent opposed the concept and 34 percent supported it.

Respondents showed their concern about marijuana in some of the other findings of the poll:

	Agree	Disagree
"People who use marijuana are likely to go on to use other drugs."	63%	23%
"Marijuana is more harmful than alcohol."	34%	49%
"Sale and use of marijuana should be completely legalized."	23%	73%

ARREST PATTERNS

New Jersey has experienced a rise in drug arrests similar to that experienced by the United States as a whole. From 1967-1972, the total narcotic and dangerous drug arrests increased 461 percent (see Table V-25).

The latest full year for which arrest data have been formally compiled and readily available for marijuana in New Jersey is 1973. In that year, 12,269 arrests were made for possession or sale of marijuana (up from 8,163 in 1971). By far the most common arrest was for simple possession of less than 25 grams, as shown in Table V-26. Of those arrested, a majority (55.2 percent) were under 21, and 83.5 percent were under 25. The full pattern of case dispositions is presented in Figure V-1. As is clear from Figure V-1, some individuals (about 4 percent of those convicted of possession of less than 25 grams) went to jail for up to 1 year. However, the most likely punishment was a fine (62 percent of those convicted), and the next most likely punishments were probation (17 percent) or suspended sentence (17 percent). Unfortunately, the cause for the differences in punishment is not known, that is, whether the differences result from personal case histories, number of prior offenses, geographical location, or other causes.

TABLE V-25

NARCOTIC AND DANGEROUS DRUG ARRESTS IN NEW JERSEY

YEAR	NO. OF ARRESTS
1967	5,045
1968	7,896
1969	13,364
1970	22,941
1971	27,092
1972	28,313

Source: Report of the New Jersey Legislature Drug Study Commission.

TABLE V-26

MARIJUANA ARRESTS IN NEW JERSEY
(1973)

OFFENSE	TOTAL	PERCENTAGE
Possession of Less than 25 Grams	9,053	73.8
Possession of More than 25 Grams	2,573	21.0
Distribution	643	5.2
TOTAL	12,269	100.0

SOURCE: New Jersey Criminal Justice Data Analysis Center.

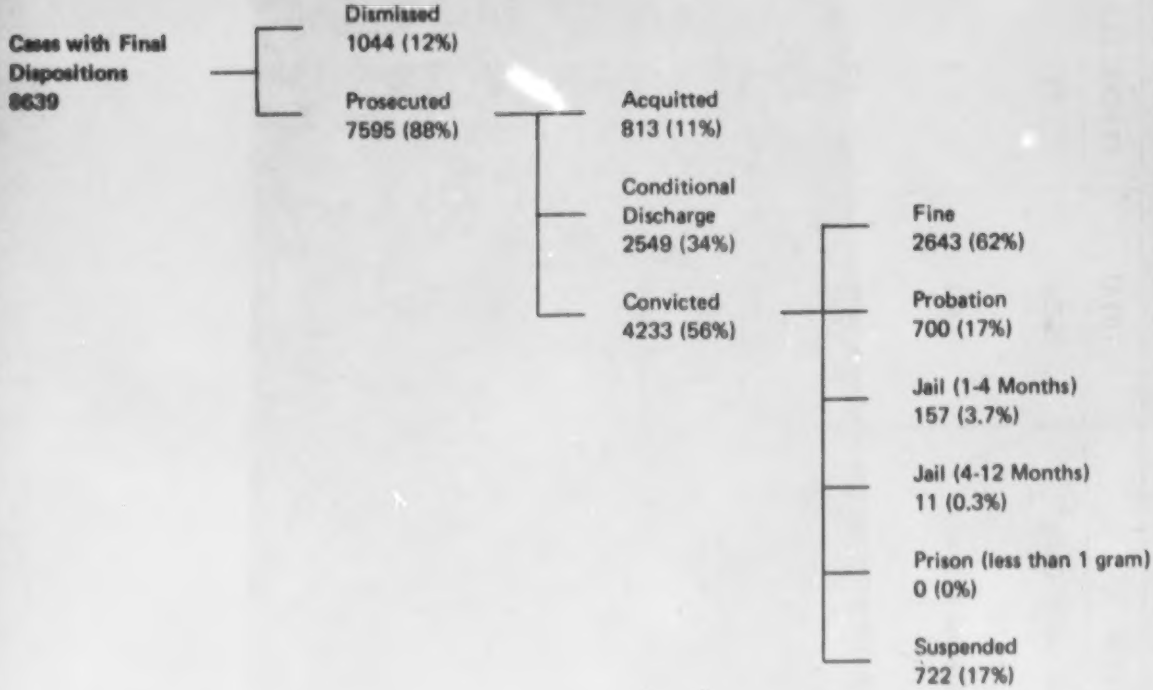
Cases with Final Dispositions 8639
Dismissed 1044 (12%)
Prosecuted 7595 (88%)
Acquitted 813 (11%)
Conditional Discharge 2549 (34%)
Convicted 4233 (56%)
Fine 2643 (62%)
Probation 700 (17%)
Jail (1-4 Months) 157 (3.7%)
Jail (4-12 Months) 11 (0.3%)
Prison (less than 1 gram) 0 (0%)
Suspended 722 (17%)

FIGURE V-1: DISPOSITION OF NEW JERSEY MARIJUANA CASES
(Possession of Less than 25 Grams)

For possession of more than 25 grams, a larger percentage (8 percent) received jail or prison terms (some for more than 2 years), but the majority still received a fine or probation only.

Even for distribution, only a minority of individuals (17 percent) received jail sentences. The majority were given probation. These data indicate that as early as 1973 most marijuana offenders did not receive jail sentences. In this sense, possession was in fact "decriminalized," although, of course, the necessity of court procedures remained, as did the existence of a permanent record.

FOOTNOTES

[1] State v. Ward, 57 N.J. 75 (1970).

[2] State v. Brennan, 115 N.J. Super. 400 (App. Div., 1971).

[3] N.J. Department of Law and Public Safety, Report on the Controlled Dangerous Substance Act, Trenton 1973.

[4] Ibid, p. 52.

[5] Division of Criminal Justice, Report on Proposal for the Decriminalization of Marihuana, 1976.

[6] State v. Mania, 1976, Superior Court of New Jersey, Appellate Division, D-51a. Both appellate courts refused to review the issue on an interlocutory basis. The issue will subsequently be reviewed as a matter of right.

APPENDIX

RESEARCH METHODOLOGY

Peat, Marwick, Mitchell & Co. conducted this research study for the National Governors' Conference under a grant from the Law Enforcement Assistance Administration (LEAA). Two outside consultants assisted the PMM&Co. project team. Dr. Richard J. Bonnie, professor of law at the University of Virginia and former associate director of the National Commission on Marihuana and Drug Abuse, played a primary role in the compilation and analysis of current state laws and regulations and had primary responsibility for the issue analysis framework in Volume 2. Dr. Peter G. Bourne, a psychiatrist who was former associate director of the White House Special Action Office for Drug Abuse Prevention and recently named Special Assistant to President Carter for Mental Health and Drug Abuse, prepared the summary of medical and scientific research contained in Volume 3.

To guide, review, and evaluate the research effort, PMM&Co. formed an Interdisciplinary Assessment and Review Panel, that consisted of the PMM&Co. study team and representatives from the National Governors' Conference and LEAA. The panel met three times to review the research methodology, select and frame the site visit data collection effort, and evaluate the data collection results and frame the analysis effort.

The study involved the following primary tasks:

- development and finalization of a project plan to expand the original research proposal so that the major researchable issues were sufficiently covered.
- conduct of a literature search and synthesis of recent and relevant written material from both governmental and nongovernmental sources, which provided the basis for the Volume 3 chapters on the history of the marijuana issue and usage patterns.
- compilation of state laws and regulations on marijuana, with particular emphasis on personal possession policy and penalty approaches.

- development of the site visit and case study methodology. This task involved the selection of target states for further research, development of a data acquisition strategy, and design and testing of structured interview guides to assure consistent data collection.

- conduct of site visits, which included interviews with key political, media, and public figures who played a role in the state process of consideration of the issues and a review of relevant state data.

- analysis of all research materials to distill the primary issues and approaches to consideration of marijuana enforcement policy.

- development of final reports and review by panel members.

In particular, our research was oriented toward five primary targets. The project team compiled and analyzed general information regarding the medical, legal, and social aspects of marijuana use in the United States. The purpose of this effort was to provide background material on marijuana and an overview of the current knowledge about marijuana. This overview provided the basis for more specific analyses in the other four areas of research and evaluation. It was not possible to analyze and summarize the entire range of literature on marijuana, which is immense. However, Governors and their staffs can be provided with a sound knowledge base, including areas of agreement and disagreement.

The other four research areas involved a more specific investigation into state and, to some degree, local government experience with marijuana legislation. The current status of state marijuana legislation was compiled, including prior law in those states in which change was analyzed as part of this research. Finally, research was conducted on the impact of changed legislation. Although probably the most important issue, it is also among the most difficult to respond to factually. The importance of the impact question derives directly from the nature of the arguments used to justify the decriminalization policy alternative.

Several caveats regarding impact questions are in order. With the exception of Oregon, all states that have decriminalized have done so since early 1975. Recognizing, therefore, that these states are literally in the midst of their legal system change, it is too soon to assemble completely satisfactory impact data. Also, this study is highly dependent upon the existence of previously collected data. When such statewide data exist, a substantive basis for the impact analysis will exist. When such data do not exist, however, the use of subjective assessments and generalized findings will increase.

To be valid, trend data should be analyzed over a sufficient number of years. Differences between data for only two years, even if they represent periods before and after any change in legislation, may reflect a long-term trend, rather than a change resulting from the law. Unfortunately, long-term data are relatively unavailable, and special care must therefore be taken to ensure that relationships, particularly causal relationships, are not misassigned.

In addition, data were compiled to highlight trends in usage within the states, based primarily on available state and selected federal statistics. The political history of the legislation was analyzed to reflect the process of change in each of the sampled states. This involved an historical portrait and analysis of the process of change from the previous legislation to the current. The purpose was to provide policymakers with examples of legislative changes. The analysis was based on both case histories and a compilation of common factors in those states that have decriminalized. For example, it can be determined whether a key influential individual played an important role in states that decriminalized, or whether favorable press backing was crucial in passage of marijuana decriminalization.

MARIJUANA

A Study of State Policies & Penalties

Part Two
Findings and Analysis

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FOREWORD

Marijuana: A Study of State Policies and Penalties is a comprehensive analysis of issues concerning marijuana that are of importance to state policymakers. The study reviews the medical, legal, and historical dimensions of marijuana use and examines the range of policy approaches toward marijuana possession and use which state officials have considered. Attention is directed to the experience of eight states that have eliminated incarceration as a penalty for private possession of small amounts of marijuana as well as to the experience of states that have not passed such decriminalization laws.

Governor Brendan T. Byrne of New Jersey proposed in 1975 that this study be initiated to provide state policymakers with better information on issues concerning marijuana. The Executive Committee of the National Governors' Conference authorized the NGC Center for Policy Research and Analysis to undertake the study. The Center obtained financial support from the National Institute of Law Enforcement and Criminal Justice of the Law Enforcement Assistance Administration and selected the firm of Peat, Marwick, Mitchell & Co. to conduct the study. An expert Interdisciplinary Review and Assessment Panel provided guidance and quality control throughout the research process.

Two aspects of the study should be emphasized at the outset. First, the study provides a comprehensive, independent, and objective analysis of the issues under examination. It does not, however, make policy recommendations, but instead leaves the evaluation of data and the development of specific policy options to state officials. Second, the assessment of the experience with decriminalization laws, which have been passed only recently, is based on the best data now available rather than on trend data or longitudinal analysis. Further assessments, based on more substantial and longer-term data, will determine whether or not the impact of the new laws over time on the criminal justice and health care systems and on usage is consistent with the patterns observed to date.

The efforts of many persons have made this study possible, including the PMM&Co. study team and the Interdisciplinary Review and Assessment Panel. John Lagomarcino of the NGC staff has made major contributions. The counsel of Dr. Helen Erskine of the National Institute of Law Enforcement and Criminal Justice has also been of great benefit.

Stephen B. Farber, Director
National Governors' Conference

PREFACE

There has been no Governor of any state in the nation over the past decade who has not felt some pressures--and often very strong pressures--to enact some change or other in the law affecting the use and possession of marijuana.

It is to help present and future Governors deal with these pressures knowledgeably and reasonably that I proposed this study and the National Governors' Conference Executive Committee agreed to undertake it. The study was underwritten by the Law Enforcement Assistance Administration.

There is an abundance of literature on what marijuana is and isn't and on the medical and sociological results of its use. We have not attempted any exhaustive evaluation of these questions, other than to summarize that body of literature.

We have instead focused attention on the experience of several states that have taken or attempted action of one kind or another to deal with the problem. In eight states the legislature has changed the law to decriminalize the use or possession of small quantities of marijuana; in one of those states the court also mandated a change in approach.

Even Governors who have no intention of initiating action with their legislatures in this area may have to anticipate a court-mandated reevaluation of the situation.

This report is an attempt to evaluate how and where the legal approach to marijuana use and possession has changed; what the measurable effects of those changes have been on law enforcement and other government functions in the state making the change; and what sort of response by the executive branch appears to be necessary or advisable in order to cope with those changes successfully.

I hope that this study will prove to be a useful tool in the hands of Governors who will be coming to grips with changes in this area in the years ahead.

Brendan T. Byrne
Governor of New Jersey

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ACKNOWLEDGMENTS

Peat, Marwick, Mitchell & Co. conducted this study for the National Governors' Conference under funding provided by the Law Enforcement Assistance Administration of the Department of Justice. The written contributions of Professor Richard J. Bonnie of the University of Virginia School of Law, and Dr. Peter G. Bourne, appointed since the study as a Special Assistant to President Carter, are acknowledged in the reports. In addition, we would especially like to express our appreciation and give appropriate recognition to two members of the PMM&Co. study team: Morten Engstrom, who as lead consultant on the study labored long and hard in the research, field interviews, and compilation of drafts; and Judith A. Cass, the PMM&Co. technical editor, who perspicaciously refined the drafts into final form.

Raymond T. Olsen, Project Director

Lawrence S. Herman, Project Manager

INTRODUCTION

The debate on the marijuana issue during the last half century has been characterized by the use of exaggerated and erroneous data by both sides. Generally, however, the use of the drug was limited to relatively small segments of the population that were not part of major political or constituency groups.

During the last decade, personal use and possession of marijuana have escalated dramatically, transcending nearly all geographic, social, and economic categories. Today, for the first time in our nation's history, the majority of senior high school students and young adults between the ages of 18 and 25 have tried marijuana, and the "current use" portion of these populations is near 25 percent. Nor is use negligible in other age categories; individuals in all age groups and from all social backgrounds have tried or are regular users of marijuana.

Concurrent with this growth in use has been an increased concern over the validity and efficacy of current laws, particularly at the state level. Are the laws effective in minimizing marijuana use? Are the personal and criminal justice system costs incurred in enforcing the laws justified by the seriousness of the crime? In general, are the laws morally (and even politically) valid?

In 1973 the Presidentially appointed National Commission on Marihuana and Drug Abuse recommended the elimination of penalties for simple possession of the drug. The Commission on Uniform State Laws concurred with this recommendation, and numerous other national groups have also advocated some form of penalty reduction for simple possession of marijuana.

In addition, substantial research has been conducted recently on the medical, scientific, and social aspects of marijuana use, and the nature and effects of marijuana are now better understood than they have ever been. Although many unanswered questions remain, the areas of medical uncertainty have been rapidly narrowed.

And finally, President Carter has recommended the lessening of penalties for simple possession. In a statement during the recent campaign, President Carter said:

> Based on present evidence I am not convinced that marijuana use is completely free from any health hazard. However, I

am deeply concerned that over the past two years between 400,000 and 450,000 Americans have been arrested on marijuana charges, comprising an average of 69 percent of all drug arrests which occurred in this country. These were individuals who in other respects were normal law abiding citizens. I am in favor of decriminalization of small amounts (1 oz. or less) of marijuana and am watching closely recently implemented programs to decriminalize possession in Oregon, Alaska, Maine, Colorado, South Dakota, Minnesota, California, and Ohio. I believe that if there is no evidence of increased use, such an approach could usefully be considered elsewhere in the country on a state-by-state approach.

Views on marijuana, of course, are quite divergent. Strongly held opposing views are also expressed. This study is intended to help state governments effectively examine their marijuana laws. In the recent past, eight states have passed new laws eliminating incarceration as a penalty for private possession of small amounts of marijuana. These eight states have used a broad variety of levels, approaches, and conditions. In most states, however, the potential for substantial incarceration exists, but the penalty is not evenly applied to all offenders who come in contact with the criminal justice system.

This study is not advocative. It does not recommend a single policy approach to marijuana. Governors, legislators, and executive policymakers must make their own decisions as to the legal structures which best correspond to their own needs, conditions, and perceptions.

The specific objectives of Volume 2 are to:

- provide a summary of the informational background which must serve as a base for objective policy assessment;
- describe a framework for assessing existing and potential policy and legislation;
- summarize the findings of a study of selected states which have undertaken significant marijuana policy reevaluation; and
- provide a legislative guide of alternative marijuana policy approaches for state policymakers.

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Chapter I summarizes the historical, social, and medical information that can serve as a base for rational policymaking. Chapter II discusses a framework which allows policymakers to simultaneously focus attention on the currently relevant policy choices and provide a perspective on the more general marijuana issues.

Chapter III discusses the immediate issues, together with the positions of advocates and opponents, on marijuana policy. Chapter IV presents the findings and evidence of this study concerning these issues, so that the experience of several states can be used to test the strength of various arguments for and against penalty reductions. Finally, Chapter V provides a legislative guide for policymakers who wish to consider change in their state's marijuana law. This guide will discuss the ramifications of various detailed approaches to the law.

I. MARIJUANA: BACKGROUND OF THE ISSUE

This chapter summarizes some of the relevant medical, social, and usage information that is required to analyze the major issues facing marijuana policymakers. It is not intended as a complete summation of all available information. More detailed presentations and references are provided in Volume 3 of this study.

HISTORICAL OVERVIEW

The first marijuana prohibition laws were passed by several states in 1914 and 1915, and a majority of the other states followed in the succeeding two decades. Although little was known about the effects of marijuana, these laws were a response to fears that marijuana caused severe psychological and physical damage as well as antisocial and criminal behavior. It was felt that marijuana was related to the narcotic drugs (i.e., heroin and opium) more than to alcohol and tobacco. This perceived relationship was based to a great extent on the nature of the user rather than on factual information concerning the pharmacological and behavioral effects of the drug. During this period, marijuana was used primarily by minority groups, such as Hispanics and blacks, and it had not been assimilated in the culture of majority groups in the way that alcohol and tobacco had.

Marijuana prohibition became a part of federal legislation in 1937 when the Marijuana Tax Act was passed. The strongest and most active proponent of this act was the Federal Bureau of Narcotics, which presented marijuana as a drug that induced insanity, addiction, and criminal behavior. These beliefs persisted well into the 1960s and are still held by many unfamiliar with the recent research on marijuana. Between the 1930s and the 1960s marijuana penalties became increasingly severe partly as a result of the classification of marijuana as a narcotic. In the 1960s, however, marijuana became a drug of the middle-class youth. As influential individuals became acquainted with marijuana through research reports and its use in their own community, attitudes began to change. Since 1970, marijuana penalties have generally been lessened in severity, and increasing amounts of research have been performed. In the last 3 years, the Federal Government has expended approximately $13 million in marijuana research alone.[1]

MEDICAL/SCIENTIFIC INFORMATION

The physiological effects of marijuana are highly complex and are dependent on dose, physical health of the user, previous history of use, psychological characteristics of the user, and the social setting of use. Because of this complexity, many of the statements below are generalizations that may not be applicable in specific instances.

The most common medical response to acute doses of marijuana is an increased heart rate and reddening of the eyes. Usage-related changes in brain waves occur, although this effect is apparently significantly dependent on the dose to which the user is accustomed. On rare occasions, adverse psychological reactions are experienced, although this appears to be related primarily to the psychological health of the individual and the social setting in which the drug is ingested.

All medical and scientific evidence indicates that marijuana is not physically addictive in doses achievable in normal use. Some evidence indicates that heavy users may develop a type of psychological dependency, although this is difficult to both define and document. Some concern has also been expressed about the possibility of marijuana use (and abuse) leading to the use of other drugs, particularly heroin. This progression theory, however, has not been documented. Marijuana users are likely to use other drugs, both licit and illicit, with a positive correlation between level of marijuana use and the variety of drugs used. This correlation, however, represents a psychological predisposition, and the evidence suggests that the use of other drugs would not be reduced if marijuana were unavailable.

The evidence is conflicting with respect to the genetic and immunological effects of marijuana. Although some researchers have reported inhibitions of the immune response, with a consequent potential for heightened susceptibility to disease, other researchers have found no such effect. (It may be that there is a short-term inhibition that later corrects itself.) Populations with a higher usage rate do not show any increased evidence of disease.

Similarly, the evidence with regard to marijuana and genetic hazards is inconclusive, primarily because of design and methodological imperfections of most human studies. However, there is no conclusive evidence that marijuana consumption causes either chromosome damage or birth defects in humans, although several generations may be needed to detect any defects. (The data on the existence of these defects in animals are conflicting.)

The scientific findings of the effects of marijuana on the sexual hormones, particularly testosterone, are also conflicting. More work is apparently needed in this area. Current research suggests that since the body appears to tolerate a wide range of variability in testosterone levels, it may be that if a reduction in testosterone does occur as a result of marijuana use, it affects only those with previous sexual dysfunction. Although clinical evidence is absent, frequent, intensive use of marijuana during critical stages of pregnancy might result in disruption of the normal sexual differentiation patterns of the male embryo. Therefore this research indicates that marijuana use by pregnant women may be damaging.

The effects of smoking marijuana on the lungs are also uncertain. Marijuana may have adverse effects similar to tobacco. However, some evidence indicates that marijuana improves the passage of air by expanding the airways and therefore may be useful in treating diseases such as asthma.

Because marijuana does change the perceptual orientation and stimulus response time of individuals, numerous studies have found that it reduces performance in activities such as driving an automobile. Almost all evidence suggests that it is unquestionably dangerous to drive while under the influence of marijuana. A number of techniques are available for assessing the level of marijuana in the body, including blood or urine testing and breath analysis. However, these techniques are complex and require equipment that is both bulky and expensive. There is no current technology which is suitable for use by highway patrolmen.

Marijuana may have a number of potentially beneficial medical uses. For example, it has been found useful in the treatment of glaucoma patients because marijuana reduces intraocular pressure. At least one glaucoma patient is currently formally prescribed marijuana with the active consent of the Federal Government. Positive results have also been obtained by using marijuana to prevent nausea and vomiting and to reduce pain in cancer patients being treated with chemotherapy.

Compared to most pharmaceuticals, marijuana is quite low in biological toxicity. Thus, it is doubtful that deaths could be directly attributed to an overdose of hashish or marijuana.

In conclusion, therefore, in spite of the extensive research that has been performed since 1970, there is still no clear evidence of serious physiological or psychological effects as a result of occasional use. Evidence is conflicting on the more subtle potential adverse effects. Some such effects have been found, but the research has subsequently been contraindicated or the methodology challenged. To a number of researchers, alcohol and tobacco may have more directly harmful effects. This is not to say, of course, that marijuana is harmless and that such effects may not be found in the future.

USAGE PATTERNS

Current evidence indicates a significant increase in marijuana use by Americans during the last 5 years. The evidence also indicates that this increase may be slowing or may have already reached its peak, although it is premature to make this conclusion with any certainty.

Currently, approximately 22 percent of the United States population over the age of 12 has used marijuana at least once, which represents some 37 million individuals. Perhaps a more important statistic is that approximately 8 percent of all adults (over the age of 18) and 12 percent of all youths (ages 12-17) are current users (i.e., have used marijuana at least once in the last month).

Marijuana use is highly age specific. The largest group of users is in the 18-25 age range, of which 53 percent have used marijuana at least once and 25 percent have used it within the last month. Use is also high among high school youths, who have an almost identical use pattern. A recent study of high school seniors indicates that more than 19 percent have used marijuana more than 20 times in the last year. Use among adults drops off sharply after age 25. In the age group 26-34, only 11 percent are current users, and only 1 percent of those 35 and older are current users. Perhaps the two major factors for this decreasing use with age are:

- a change in life style that results from maturation, marriage, and employment; and
- an insufficient time period for the younger groups, in which the largest growth in marijuana use occurred during the past decade, to progress to this age category.

It is not clear which of these two factors will prove to be most important; that is, whether use will increase in the older age categories as young people familiar with marijuana grow older, or whether these individuals will refrain from using as they mature. Without question, however, use by individuals over 25 has continued to increase.

Among individuals under 21, increases in the level of use have stabilized. In the latest survey by the National Institute of Drug Abuse, no age group has shown a significant increase. Although at least one other study conflicts with this survey, it is possible that use has stabilized.

It is important to retain a perspective concerning the size of the increase in recent years. A 1967 poll reported that only one in 20 students had ever used marijuana. By 1975 over half (55 percent) reported use in a similar poll. Within 7 years, what was once clearly statistically deviant behavior had become the norm for this age group.

With the increased use during the last decade, marijuana is no longer the drug of a single social group. Although marijuana use was originally associated with the "counterculture" and was symbolic of its opposition to traditional values and to the prevailing political climate, its use has spread to large numbers and more conservative segments of the American population.

RECENT TRENDS IN STATE MARIJUANA POLICY

In the period between 1965 and the early 1970s, almost all states reduced the penalties for possession of small amounts of marijuana from felonies to misdemeanors. The Uniform Controlled Substances Act of 1970 contained a provision for misdemeanor penalties for possession of controlled substances.

A National Commission on Marihuana and Drug Abuse was established in 1970 and was broadly mandated to investigate "the nature and scope of marijuana use, the effect of the drug, the relationship of marijuana use to other behavior, and the efficacy of existing law." The Commission recommended, among other things, that:

- under state law, cultivation, sale, or distribution for profit and possession with intent to sell remain felonies;
- possession in private for personal use no longer be an offense;
- distribution in private of small amounts for no or insignificant remuneration no longer be an offense;
- public possession of less than 1 ounce no longer be an offense, but that marijuana be subject to summary seizure and forfeiture; and
- public possession of more than 1 ounce be a criminal offense punishable by a $100 fine.

In 1973, the National Conference on Uniform State Laws instituted amendments to the Uniform Controlled Substances Act that followed in substance the recommendations of the National Commission. Some form of decriminalization has been supported by a number of national organizations, including the Governing Board of the American Medical Association, the American Bar Association and numerous state and local bar associations, the National Education Association, Consumers Union, the American Public Health Association, and the National Council of Churches.

In 1973, Oregon became the first state to decriminalize possession of small amounts of marijuana. Since that time, a total of eight states have eliminated incarceration as a penalty for simple possession. The exact specifications of these laws differ substantially and are described in greater detail in Chapter IV of Volume 3. Some of these states have made possession a civil offense; in others it remains a criminal offense, but frequently the law contains provisions for expungement of criminal records after specified periods of time. In Alaska, because of an Alaskan Supreme Court ruling, possession by adults in the home for personal use is not an offense at all.

There have been other trends in marijuana policy since 1970:

- Sale penalties have been gradually decreasing, but the offense is still a felony in the vast majority of jurisdictions, typically carrying a maximum sentence of 5 years or more.
- "Accommodation" transfers of marijuana are increasingly punished like simple possession offenses rather than sale offenses.
- Cultivation is usually subject to the same sentence as sale.
- Amount classifications are used in some states to exempt users from criminal dispositions, and in others to ensure that possession of large amounts can be punished as a felony.
- Discretionary conditional discharge is still the most widely legislated noncriminal disposition; however, eight states have enacted mandatory fine-only provisions covering possession of small amounts.
- Expungement (or the equivalent) of arrest and conviction records is now possible in 20 states for certain categories of marijuana users.
- Marijuana and hashish are treated differently in 18 states, either through parallel amount classifications or through noncriminal disposition provisions covering marijuana only.

PUBLIC ATTITUDES AND BELIEFS

Among nonsmokers, the most frequent reasons for not using marijuana are a simple lack of interest and fear of harmful medical effects. Fear of arrest is frequently given as a reason but seldom given as the primary reason.

Reasons for marijuana use are difficult to categorize, except that marijuana is considered by many to be a pleasurable experience, and that it is used by friends and acquaintances in an individual's peer group. Marijuana is a social drug and is used more frequently at social gatherings than alone.

A majority of the adult public still considers marijuana to be addictive (approximately 70 percent) and to lead to the use of harder drugs (approximately 50 percent). As late as 1973, a majority (58 percent) also believed that marijuana led to the commission of crimes not otherwise committed, although this belief was held primarily by those without personal marijuana experience. As reported earlier, these beliefs are contraindicated by current research.

Public attitudes toward penalties for marijuana possession are equivocal, although a clear majority supports the retention of jail sentences for sale. Many, but not all, of the recent national surveys on this issue indicate that a majority supports the elimination of jail sentences for simple possession. However, only a small percentage of the public (17.8 percent in the 1975/76 National Institute on Drug Abuse survey) favors elimination of all penalties for simple possession. The strength of public attitudes (that is, whether opinions were held firmly or marginally) has not been measured by any of these surveys.

During the course of the current survey, the study team contacted a number of major organizations that have some interaction with the marijuana issue. The positions of those who responded are tabulated in Table I-1. In large measure, the criminal justice system groups opposed decriminalization, while the others supported minimization of penalties for simple possession.

SUMMARY

The major conclusions of this chapter are:

- Few, if any, serious adverse effects of marijuana taken in moderation are currently proven. Although there have been scientific allegations of such effects, such allegations have been subsequently disproven or the methodology challenged. However, longer-term impacts on such things as genetic effects, the effects of marijuana use on pregnant women, the effect on individual sexual hormones, and the effect of long-term marijuana smoking on the smoker's lungs cannot be conclusively determined at this time. In addition, information concerning driving

TABLE I-1

POSITION ON MARIJUANA OF SELECTED NATIONAL ORGANIZATIONS

ORGANIZATION	DATE OF RESOLUTION	POSITION
National Conference of Commissioners on Uniform State Laws	1973	Decriminalize possession for personal use (1 oz.) and gratuitous transfer. Public possession or distribution a misdemeanor.
National Education Association	1972	Support National Commission recommendations (No penalty for private simple possession)
National Association of Attorneys' General		Currently no official position.
International Association of Chiefs of Police, Inc.	1975	Oppose attempt to decriminalize or reduce penalties because of medical harm and relationship to other drugs and other criminal behavior.
American Bar Association	1972	No criminal laws punishing simple possession or casual transfer.
American Medical Association	1973	At most a misdemeanor.
National District Attorneys' Association	1973	Should remain illegal and subject to criminal prosecution.

while under the influence of marijuana requires further research.

- The use of marijuana has increased tremendously over the past decade but may now be stabilizing.
- The public believes that marijuana should not be legalized but may support the elimination of incarceration for simple possession.

FOOTNOTES

[1] National Institute of Drug Abuse, Bureau of Research, personal communication, February 7, 1977.

II. MARIJUANA: A POLICYMAKING FRAMEWORK

OVERVIEW

Consideration of alternative marijuana policies and approaches by state-level policymakers (the Governor and staff and legislators and their staffs) requires a philosophical and conceptual framework.

Detailed summaries of the extensive historical, legal, medical, and use data required for thorough consideration of the issue are provided in Volume 3. These data serve as a factual base for constructing an analytical model, which is the purpose of this chapter.

This framework is intended specifically for consideration of marijuana policy but may be useful for other drugs with potential for abuse, including alcohol and tobacco. Marijuana is, however, a unique drug in this country. As noted earlier, attitudes toward its use and control have been influenced by historical tradition and cultural biases as well as by scientific and medical research. Although often grouped with other drugs that historically have been abused in our society, a number of factors suggest that marijuana requires separate consideration:

- Personal use and acceptance of the drug have escalated substantially in recent times and cut across most socioeconomic and cultural boundaries.

- During the last half century, marijuana was considered, in both common and legal use, as a "narcotic," although it differs from narcotics in its derivation and pharmacology, and especially in the fact that it is not physically addictive.

- Major segments of society have increasingly come to the conclusion that existing policies for marijuana use (as relative to other substances of potential abuse) are in need of reform.

- Medical and scientific research have generally concluded that the adverse effects of marijuana use are far less severe than traditionally thought, although more research is required on such things as genetic effects, the effects of marijuana use on pregnant women, the effect on individual sexual hormones, and the effect of long-term marijuana smoking on the smoker's lungs.

THE APPROACH

The analytical framework can be introduced very simply. Policy decisions regarding marijuana are perceived to occur at various levels of generality. Each level contains its own set of issues and options. Decisions must be made at the broadest level first, based upon the values and philosophical predispositions of the decisionmaker, and then on successively more focused levels. However, decisions at the broadest level are frequently implicit; in some cases policymakers may not be aware that such decisions have been made at all. Therefore one important objective of this chapter is to present an overview of the full decision process, as outlined in Figure II-1.

The decision process has been telescoped into three steps: (1) the decisionmaker must articulate philosophical premises and policy objectives; (2) assuming a "discouragement" policy is articulated, a basic scheme for implementing it must be selected; and (3) assuming choice of a discouragement policy implemented by a prohibition of non-medical availability, the decisionmaker must decide whether to impose sanctions on the user.

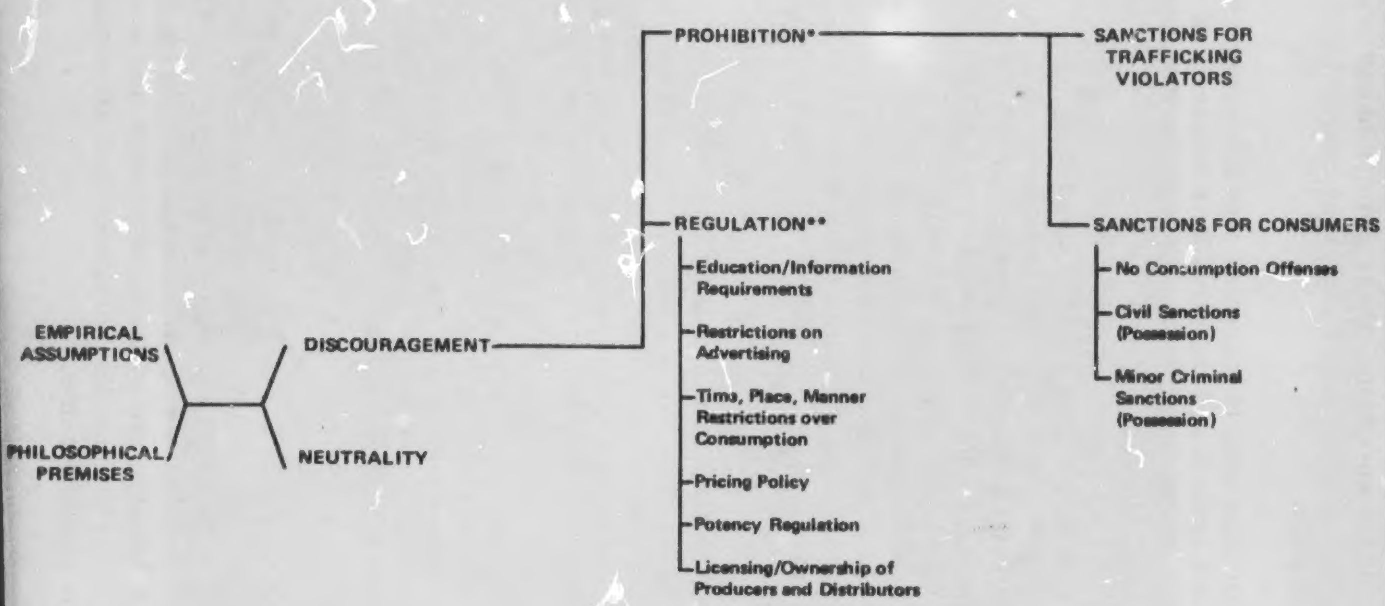
Articulating a Philosophical Premise

Although philosophical perceptions cover a continuous spectrum, they may be divided into three categories for our purposes. At one end of this spectrum, several "libertarian" philosophical premises are frequently expressed in support of this society's current posture toward alcohol and tobacco, and might be thought applicable to marijuana:

- The decision to use a recreational intoxicant is a personal moral decision in which the government has no authority to interfere.

- The decision to risk one's own health through use of a psychoactive substance is a personal decision; and the government has authority to intervene only if the use of the drug has incapacitated the user or has induced behavior causing harm to others.

Under this set of assumptions, identified with John Stuart Mill, the government has no authority to suppress the consumption of marijuana. Instead the only legitimate role of the government is to provide disincentives for (1) drug-induced behavior posing risks to others or


EMPIRICAL ASSUMPTIONS
PHILOSOPHICAL PREMISES
DISCOURAGEMENT
NEUTRALITY
PROHIBITION*
REGULATION**
Education/Information Requirements
Restrictions on Advertising
Time, Place, Manner Restrictions over Consumption
Pricing Policy
Potency Regulation
Licensing/Ownership of Producers and Distributors
SANCTIONS FOR TRAFFICKING VIOLATORS
SANCTIONS FOR CONSUMERS
No Consumption Offenses
Civil Sanctions (Possession)
Minor Criminal Sanctions (Possession)

*Legitimate Availability for Medical Purposes Only
**Drug is Legally Available for Non-Medical Purposes

FIGURE II-1: THE POLICYMAKING FRAMEWORK

(2) intensified patterns of use which, in the aggregate, impose burdens on society's health care and welfare systems.

At the other end of the spectrum, those policymakers who do not accept these categorical philosophical premises may articulate alternative categorical premises:

- The government may aim to suppress and discourage use of any intoxicant considered immoral by a majority of the populace.

- The government may aim to suppress and discourage any behavior that could be harmful to the individual.

Under either of these premises, it is legitimate for the government to try to discourage marijuana consumption, even if it does not take a similar stance toward alcohol and tobacco. Whether the government ought to do so in all cases becomes a more pragmatic question that is dependent on political, economic, and cultural factors. Ultimately, these pragmatic questions may be crucial in determining how a discouragement policy should be implemented, the second level inquiry to be addressed below.

Third, a policymaker might adopt an intermediate philosophical stance under which the legitimacy of government intervention would be dependent on the magnitude and gravity of the harm associated with use of the drug. This intermediate view would reject the notions that (1) government could aim to suppress use simply on moral grounds and (2) a mere risk of harm to the individual justifies government intervention. This view might be articulated in any number of ways, including, for example: Government has no authority to suppress the simple use of an intoxicant unless the medical or behavioral consequences of use involve a substantial probability of impaired individual functioning and a derivative burden on the society's health care and social service systems.

This balancing philosophical view is contrasted with the categorical views noted above. For this reason, it has no clear implications regarding marijuana policy in the absence of data regarding the individual and social consequences of use. The question is simply when does the impact of excessive use of the public health and welfare become great enough to justify the discouragement of all consumption, even recreational or moderate use.

On the basis of what we know about marijuana today, many observers believe that the social risk is too slight to support a discouragement policy and to justify a suppression of personal choice. This belief is by no means universal, however, and current governmental policy is premised on the view that the health and behavioral consequences of long-term, chronic use are sufficiently uncertain that all use should be discouraged.[1]

Assuming that, philosophically, the government may legitimately seek to suppress and discourage consumption, the question arises whether it should in fact do so. For example, some argue that the use of intoxicants is inevitable and that society is better off, in the aggregate, if persons seeking drug-induced alterations of mood do so with marijuana instead of alcohol. Others have suggested that marijuana use is pleasurable and might serve a useful social function in trimming the aggressive edges from this highly competitive society.

On the other hand, defenders of existing policy have speculated that heavy users of marijuana (who represent most of the public health problem) would not be drawn from the population of persons who would otherwise have been alcoholics or alcohol abusers; instead they predict that society will bear the burden of both casualty groups. Defenders of existing policy also point out that national policy is moving in the direction of discouraging tobacco use and that national and state leaders may want to reconsider the current neutral posture toward alcohol use. This is no time, they say, for modifying the current approach to marijuana.

Implementing a Discouragement Policy

Assuming that government may legitimately choose to suppress and discourage marijuana consumption and that policymakers have chosen to do so, the next level of inquiry concerns how best to implement that policy.

For current purposes, the crucial choice regarding means of implementing a discouragement policy is whether to permit the substance to be legitimately available for nonmedical, recreational, or self-defined purposes. The alternative approach (in effect in this country for a half century) is to restrict the legal market to medical and research needs and prohibit all other cultivation, importation, and distribution. If prohibition were to be repealed and marijuana were to be legitimately available for self-defined use, as alcohol and tobacco now are, then the policymaker must also devise a regulatory scheme that establishes the conditions under which the drug may legally be produced, distributed, and used.

It is important to emphasize that regulatory approaches are not inconsistent with discouragement policies. The current national objective regarding tobacco use seems to be to reduce consumption. To put it the other way, a decision to discourage use does not compel a decision to prohibit availability.

The best way to analyze this is to recognize that marijuana will be available and will be used regardless of the law. Current patterns of distribution suggest that law enforcement officials can intercept only one-tenth of the marijuana illegally imported into this country. If domestic cultivation were increased, the ratio would be even smaller. Thus, one of the elements of the policymaker's equation is the comparison of use patterns and social consequences under a prohibitory approach with the likely patterns and consequences under more or less restrictive regulatory approaches.

Proponents of legalization have argued that the costs of the current prohibition are substantial and could be eliminated by a regulatory system. For example, potency, purity, and quality control are now impossible. They also emphasize the fact that black market distribution puts otherwise law-abiding consumers in touch with lawbreakers who may also be pushing other, more harmful illicit substances.[2]

Opponents of legalization argue that the public health risks of substantially increased availability (which they consider inevitable under any regulatory scheme) are so significant that the costs of a partially unsuccessful prohibition are tolerable. This was, in essence, the position taken by the National Commission on Marijuana and Drug Abuse in 1972 when it rejected a regulatory approach and recommended retention of the current prohibition:[3]

> We noted above that institutionalizing availability of the drug would inevitably increase the incidence of use, even though that incidence might otherwise decrease. Of greater concern is the prospect that a larger incidence of use would result in a larger incidence of long-term heavy and very heavy use of potent preparations.
>
> There are now approximately 500,000 heavy users of less potent preparations in this country, representing

> about 2% of those who ever tried the drug. Even if the prevalence of heavy use remained the same in relation to those who ever used, this at-risk population would inevitably increase under a regulatory scheme. If the emotional disturbances found in very heavy hashish users in other countries were to occur in this country, the adverse social impact of marihuana use, now slight, would increase substantially.
>
> We have acknowledged that society, nonetheless, chose to run such a risk in 1933, when Prohibition was repealed. But alcohol use was already well-established in this society, and no alternative remained other than a regulatory approach. In light of our suspicion that interest in marihuana is largely transient, it would be imprudent to run that risk for marihuana today.

The Commission also noted that the regulatory approaches toward alcohol and tobacco needed revision and that any application of such an approach to marijuana should be preceded by careful study.[4] The Commission concluded by observing:

> Future policy planners might well come to a different conclusion if further study of existing schemes suggests a feasible model; if responsible use of the drug does indeed take root in our society; if continuing scientific and medical research uncovers no long-term ill-effects; if potency control appears feasible; and if the passage of time and the adoption of a rational social policy sufficiently desymbolizes marihuana so that availability is not equated in the public mind with approval.

In some ways, the policymaker choosing between a regulatory approach and a partially successful prohibition (which might best be regarded as a containment approach) is called on to compare apples and oranges. The public health, welfare, and criminal justice burden of current use must be subtracted from what might occur under some hypothetical regulatory approach; this constitutes that "benefit" of the prohibition. Against this, the "costs" of the prohibition must be weighed in terms of reduced freedom of choice, reduced respect for law, enforcement of the prohibition, the adverse impact on individual (and public) health and welfare of black market distribution of an unregulated drug, and other less tangible factors.

This is not an easy choice, especially in light of what we still do not know about the consequences of long-term heavy use. For purposes of the current study, however, adoption of a regulatory approach is not a sufficiently feasible alternative to merit additional attention. We say this because:

- A vast majority of the population opposes this approach for a variety of historical, socioeconomic, and cultural reasons, not the least of which is the traditional linkage of marijuana with the narcotics trade and its tradition of illegality.
- Legalization would conflict with an international treaty to which the United States is a party.
- For the state policymakers, such an option would conflict with federal prohibition laws regarding controlled substances.

Imposing Sanctions for Consumption-Related Behavior

The question, therefore, on the current agendas of state policymakers is whether a discouragement policy should include legal sanctions against the user--a person who has chosen to use the drug despite the government's discouragement efforts. The National Commission on Marihuana and Drug Abuse concluded that sanctions against the user were not necessary to implement a discouragement policy and that their enforcement caused more individual and social harm than could be possibly offset by the consumption thereby deterred. Accordingly, the Commission recommended the repeal of criminal sanctions against consumption-related behavior.

Since the Commission issued its report, eight states have enacted decriminalization schemes, and similar bills are pending in many other states. The rest of this study will be devoted to an analysis of (1) the impact of these changes in the states that have adopted them, (2) the process by which such reforms have been enacted or defeated, and (3) the technical issues that arise in connection with drafting a decriminalization scheme.

Before doing so, however, it is useful to integrate the decriminalization issue into the policymaking framework. Again, several categorical premises might well preclude sanctions against the consumer no matter what the data show. Thus, even if a policymaker supports a discouragement policy which prohibits commercial activity, he/she may also believe that:

- the state has no authority to coerce individuals (on pain of legal sanctions) to behave in their own best interest; or
- the state may not make conduct a crime simply because it is regarded as immoral or because it might injure the actor's health even if, in the aggregate, individual injuries would pose a social burden.

These arguments have frequently been heard in courts in connection with constitutional challenges to mandatory motorcycle helmet laws and the marijuana possession laws. On occasion, the courts have invalidated these laws precisely on these grounds; the constitutional doctrine usually articulated in such cases is a violation of the right of privacy and personal autonomy.

Even if no categorical bar is posed against consumption sanctions, the policymaker must also weigh the benefits of criminal sanctions against their costs. Again, this is difficult to estimate. On the benefit side, one is presumably measuring deterrence and its derivative social benefits. Deterrence is measured by determining how many fewer persons use marijuana or use it less frequently because of the sanctions against use, how many adverse health reactions or behavioral problems are thereby avoided, and how much in the way of public health and welfare resources are thereby saved.

On the cost side, one must consider the individual costs of perceived injustice, loss of liberty, and any unfairness and stigma associated with involvement in the criminal process. In addition, the policymaker must consider the institutional costs of disrespect for law when an offense is widely ignored and arbitrarily enforced. Finally, there are the efficiency costs--the criminal justice resources that are consumed in connection with the enforcement of possession laws and the processing of these cases, resources which might be better spent on more serious crimes.

FOOTNOTES

[1] These same "how much" questions are also relevant in determining how best to implement a discouragement policy.

[2] For discussions of the costs of marijuana prohibition, see Kaplan, Marijuana: The New Prohibition (1970) and Hellmer, The Marijuana Laws: The Price We Pay (1975).

[3] See Marihuana: A Signal of Misunderstanding, p. 146-150 (1972).

[4] For further elaboration of the case for evolutionary reform, see Bonnie and Whitebread, The Marihuana Conviction, p. 299-304 (1974).

III. MARIJUANA: THE IMMEDIATE ISSUES

INTRODUCTION

International obligations, federal law, and current political realities preclude enactment of a regulatory approach toward the availability of marijuana (including any variant of the so-called alcohol model) in the immediate future (see Volume 3, Chapter IV). Although a state could conceivably repeal its laws against cultivation and distribution of marijuana, leaving only the federal prohibitions in effect, such an overt departure from the prevailing national sentiment seems unlikely, at least in the foreseeable future. We assume, then, that commercial activities will remain prohibited by state law.[1]

Within these contours, the range of public policy choice involves both statutory and administrative dimensions. The statutory issue pertains to the appropriate penalty structure for noncommercial activity--possession of marijuana for personal use and other consumption-related behavior. The options include criminal penalties of varying severity as well as the several forms of decriminalization, including civil sanctions. Although administrative choices by police and prosecutors are extremely important and should not be overlooked by policymakers,[2] this report focuses mainly on legislative options.

Although a wide range of penalties for consumption-related behavior is conceivable, all but one state have already reduced simple possession to a misdemeanor (usually up to a year in jail). Eight states have reduced the penalty still further--to a fine only--and four of them do not even call the offense a crime. Proposals to enact similar penalty revisions--which generally go under the label decriminalization--are pending in virtually every other state.

During the deliberations concerning decriminalization, arguments both pro and con are frequently made on the basis of predictions about the likely impact of such a change. These arguments raise empirical questions that generally fall into three categories:

- impact on patterns of use (changes in incidence and intensity and circumstances of consumption);
- impact on public health and welfare (the derivative effect of increased adverse health reactions and traffic- and

job-related accidents on the society's health care and social service systems); and

- impact on the criminal justice system (derivative savings in the costs of enforcing the marijuana laws, including the costs of law enforcement, judicial, prosecutorial, defense, and corrections resources).

Not all of these questions are researchable; and even if researchable, many of them would take years and considerable effort to unravel. For purposes of this study, we have reviewed existing statistical data in those states that have enacted decriminalization and have conducted on-site interviews to assess the direction and gross magnitude of the changes.

IMPACT ON PATTERNS OF USE

As indicated above, a change in the legal status of consumption-related behavior may be associated with a change in the incidence (number of users) and intensity (frequency and amount) of use and circumstances of use.

Incidence and Intensity of Use

The primary concerns about the incidence and intensity of use are based upon the potential harmful effects of marijuana use. Opponents of decriminalization often contend that withdrawing criminal sanctions for consumption will undermine the discouragement policy and result in increased consumption. In their view, a repeal or substantial reduction of sanctions for personal possession will signal formal approval of a dangerous drug of potential abuse, eliminate the fear of arrest as a deterrent, and lessen the moral restraints on those who are uncertain about using the drug. The opponents thus contend that the adoption of decriminalization will encourage consumption, even if the prohibitions against manufacturing and commercial distribution remain in effect.

Conversely, proponents of decriminalization reject the contention that removing legal sanctions against consumption will result in substantial increases in consumption. In their view, the major deterrent exerted by legal controls is the lessened availability, which forces distribution underground, making it both inconvenient and costly to obtain the drug. This deterrent would not change if prohibition against commercial distribution were maintained. They further contend that if experimentation increases (which, as history has demonstrated, does occur at substantial levels even with the current criminal sanctions in force), the number of regular users or the intensity of consumption will not be commensurately increased. Proponents also point out that the adoption of a decriminalization policy for marijuana consumption would basically duplicate the alcohol prohibition model of the 1920s. At that time, policymakers did not adopt criminal sanctions against persons who were able to obtain alcohol despite efforts to prohibit commercial legal distribution.

Consequently, one issue to be addressed in Chapter IV is whether any significant increase in the incidence or intensity of consumption has occurred in the jurisdictions that have decriminalized possession.

Circumstances of Use

Opponents of decriminalization policy approaches also contend that regardless of the general level of consumption, the loosening or removal of sanctions against consumption will result in altered patterns or circumstances of consumption, thereby increasing the adverse social consequences of marijuana use. They maintain that not only will users consume more marijuana (perhaps increasing adverse health reactions, particularly secondary reactions) but also users will be more likely to use marijuana in public, on the job, or in vehicles, and thereby endanger the public safety.

Proponents of decriminalization contend that there will be little or no increase in public use or dangerous marijuana-induced behavior, or that such problems can be better addressed through specific laws prohibiting, for example, driving while under the influence of marijuana. Proponents further argue that costs to the health care system resulting from marijuana use may diminish rather than increase as a result of decriminalization.

Thus a second issue to be addressed in Chapter IV is whether any measurable change in the consequences or circumstances of marijuana use can be attributable to altered penalties for possession.

IMPACT ON THE PUBLIC HEALTH AND WELFARE

Opponents of decriminalization approaches often argue that the increased incidence and intensity of use and the change in the circumstances of use will result in a derivative increase in the burden on the health care system by increasing:

- the number of individuals who need treatment because of acute adverse psychological reactions to the drug, as well as other adverse medical effects; and
- the incidence of traffic- and job-related accidents attributable to irresponsible use.

Proponents of decriminalization contend no significant increase will occur in public health costs (attributable, for example, to adverse health reactions or to industrial or automobile accidents). Indeed, some proponents suggest that the proportion of public health resources devoted to marijuana use might well decrease for two reasons:

- many acute adverse reactions to marijuana among experimenters may be attributable in part to the law rather than to the effects of the drug itself, due to the psychological atmosphere in which use or experimentation generally occurs; and
- many marijuana users have been diverted to the health care and drug treatment system to avoid the stigmatizing consequences of the criminal conviction.

Thus, a third issue to be addressed in Chapter IV is whether any measurable change will occur either in demands made on the health care system or in incapacitated driving attributable to altered penalties for marijuana use.

IMPACT ON THE CRIMINAL JUSTICE SYSTEM

Proponents of decriminalization frequently point out the individual injustices allegedly perpetrated by the existing scheme of criminal sanctions. They emphasize:

- the loss of liberty attendant to arrest, detention, and any incarceration imposed upon conviction;

- the stigma and social damage to the individual caused by a criminal record, including the inability to be considered for certain jobs, licenses, and educational placements; and

- the potential infringement upon civil liberties through improper search and seizure in the enforcement of current laws.

Proponents of decriminalization also frequently mention a perceived institutional harm wrought by the marijuana possession laws: the general disrespect for the law engendered by legislation that is not enforced against all offenders, and which often is disobeyed by a large number and even a majority of individuals in certain age groups.

By definition, decriminalization would reduce these individual and institutional costs by forbidding incarceration, removing the criminal label from the offense, and removing marijuana cases from the criminal justice system altogether.

Generally, if a law is adequately drafted and implemented, criminal justice costs in terms of individual inequity, injustices, and loss of respect for law will be alleviated simply by virtue of adopting the change in the law. However, proponents of decriminalization also claim that the changes in sanctions will result in derivative social benefits. They argue that the use of the criminal justice system for marijuana-related offenses diverts needed resources from matters of greater social importance.

Because law enforcement activity is fluid and difficult to quantify, it is not possible to ascertain if law enforcement resources are being diverted to more serious public concerns as a result of decriminalization. For the same reason, it is also impossible to determine whether crime rates for robbery, theft, and other serious crimes have been reduced by virtue of redirecting police attention to these matters. However, it should be possible to ascertain empirically whether less resources are being consumed by police in the detection of marijuana offenses and by police, prosecutors, and courts in the processing of marijuana cases, and whether these resources are therefore available for other activities in other areas. This issue will also be discussed in Chapter IV.

THE PROCESS OF CHANGE

Apart from the impact of decriminalization, another area of interest to Governors and legislators is the process of change. Understanding the political environment surrounding marijuana decriminalization requires a somewhat different approach than the other issues discussed above, because the questions involved are more conceptual than quantitative. Nevertheless, they are equally important to policymakers who are interested not only in the political liability of support or opposition to decriminalization, but also in broader questions involving the political process. Eight states have essentially decriminalized simple possession, and a number of other states have defeated similar law changes. It is important to learn from their experiences and to analyze questions such as:

- Has the support for, or opposition to, the decriminalization alternative been a political liability?

- For those state policymakers who are committed to significant change of personal possession laws, what are the political conditions that appear to most influence passage of decriminalization legislation?

- Which of the various political conditions described above are essential to the ultimate success or failure of decriminalization legislation?

- What factors are influential in the passage or failure of a bill? Historically, are certain factors common to states that decriminalized, but not to those that did not?

- What positions did key individuals take, such as the Governor, legislative leaders, medical or legal societies, state agencies, law enforcement groups, the press, special interest or lobby groups, and the courts?

- What special features of decriminalization bills were important to their passage/failure, such as educational provisions, private and public use distinctions, and amount level distinctions?

- What conceptual views framed individual support or opposition to a bill?

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- What was the perceived public or media response in terms of support for the political process of change?

Chapter IV also presents the findings of this study concerning these issues.

FOOTNOTES

[1] An analysis of the various regulatory mechanisms under which marijuana could be legitimately available for self-defined uses appears in First Report of the National Commission on Marihuana and Drug Abuse, Marihuana: A Signal of Misunderstanding, Appendix Vol. II, pages 1145-1197 (1972).

[2] Whatever the prescribed penalties for commercial activities on the one hand and consumption-related activities on the other, enforcement officials at each level must also make decisions concerning the implementation of these prohibitions. These enforcement choices include allocations of investigative resources, guidelines for responses by uniformed patrolmen to detected violations, and guidelines for exercises of prosecutorial discretion.

To the extent that the Governor and other policymakers at the state level can influence the behavior of local police and prosecutors, decisions regarding enforcement priorities and practices can result in substantial reductions in the social costs of the prohibitory policies. And because they may be implemented without the heightened public visibility associated with the legislative process, administrative choices may substantially alter the operation of the legal system without sacrificing the deterrent benefits of the prohibition itself and thereby incurring the symbolic costs of repeal. This includes both decreased "deterrence" as well as heightened anxieties among those who are frightened by the change. See generally Bonnie and Whitebread, The Marihuana Conviction, pp. 273-293 (1974).

IV. CASE STUDY FINDINGS

The primary data sources for this study were nine site visits to selected states and national statistics derived from a general literature search. A detailed description of the study methodology is provided in Volume 3. The state level site visits were divided into two groups. The first group involved an analysis of both the process of change and the impact of penalty reductions in the following states:

- California;
- Texas; and
- Ohio.

The second component involved an analysis of the process of change in the following states:

- Colorado;
- Iowa;
- Louisiana;
- Maine;
- Minnesota; and
- New Jersey.

Of the states visited, the following have decriminalized (effective date in parenthesis):

- Colorado (July 1, 1975);
- Maine (May 1, 1976);
- Ohio (November 21, 1975);
- California (January 1, 1976); and
- Minnesota (April 10, 1976).

In addition, Texas substantially reduced its penalties effective August 27, 1973, although simple possession remains a misdemeanor. Because most of these laws have been effective for a relatively short time period, definitive conclusions at this time are in large measure not possible. However, trends and indicators of impact and process can be ascertained through both subjective and objective inquiries. Consequently, the first part of this chapter provides the results of our analysis of the impact of penalty reduction legislation, and the second part provides the results of our analysis of the process of change or attempted change.

Three decriminalized states were not visited: Alaska (3/1/76) because the important role of the judiciary makes its experience somewhat less extensible to other states; Oregon (10/5/73) because a number of studies have already been performed and reported in the literature; and South Dakota (4/1/77) because its decriminalization law has not yet become effective.

IMPACT OF CHANGE FINDINGS

Impact on Consumption Patterns

The study methodology did not include direct public surveys of usage patterns, and therefore changes in consumption patterns were primarily assessed through:

- secondary survey sources; and
- subjective perceptions developed during interviews with officials.

Further, with the exception of Oregon, all states that have decriminalized have done so since early 1975. Recognizing, therefore, that these states are literally in the midst of their legal system change, it is too soon to assemble completely satisfactory impact data. Of the states included in the survey, only one, California, conducted an official survey of usage patterns both before and after the change in law. This survey is not statewide, however, and involves an annual study of use among junior and senior high school students in San Mateo County. However, in a recent report of statewide usage patterns, California estimated that a relatively small proportion of new users tried marijuana because legal penalties had been reduced. Also, a post-decriminalization study was conducted in Oregon which attempted to determine whether marijuana use increased as a result of the law. (Data from both studies are summarized in Volume 3.)

San Mateo Study

The San Mateo study, consisting of approximately 20,000 junior and senior high school students, suggests no significant increase in use since 1974. The study reflects the impact of the new law that became effective on January 1, 1976, and which was preceded by substantial publicity (see Table IV-1). However, these surveys are conducted in the spring of each year and reflect only the initial months of the 1976 law. Although definitive conclusions cannot be drawn, it is a preliminary indication that no substantial increase has taken place in San Mateo County.

Oregon Study

A different evaluation approach was taken in Oregon because of a lack of pre-law usage pattern statistics. Therefore, users were asked retrospective questions on how long they had smoked, and whether they had changed their habits subsequent to the new law. Two years after the change in the law, some 87 percent of current users said they had been using marijuana more than 2 years and only 11 percent had begun using marijuana during that time. The survey results are shown in Table IV-2. These data indicate no substantial increase in use in the two years subsequent to the law; furthermore, the number of current users actually declined from 9 percent to 8 percent between 1974 and 1975.

However, the third annual Oregon study indicates an increase in use in 1976, from 20 percent to 24 percent among ever-users and from 8 percent to 12 percent among current users. These levels now approximate the average level of use in the other western states. The increase is probably not attributable to a delayed perception that incarceration was no longer a penalty for possession of less than an ounce since the decriminalization law was widely publicized in Oregon. The change in law may have had a more subtle effect by symbolizing a perception that the effect of the drug is relatively inconsequential and that private use in limited amounts is not offensive. This suggests that the most probable reason for the increase in use is not directly related to decriminalization per se. According to the Oregon data, the number of individuals who do not smoke marijuana and who gave "possible health dangers" as a reason dropped sharply from 28 percent in 1975 to 7 percent in 1976. The usage increase is

TABLE IV-1

PERCENT OF STUDENTS USING MARIJUANA

(Grades 9-12)

YEAR	PERCENT OF USERS
1973	54.8
1974	55.5
1975	55.0
1976	55.3

Source: Summary Report, Surveys of Student Drug Use, San Mateo, California, 1976.

TABLE IV-2

CHANGE IN MARIJUANA USE IN OREGON

CHANGE IN USE	PERCENT OF CURRENT USERS	
	1974	1975
Decrease	40	35
Increase	5	9
No Change	52	54

SOURCE: *Survey of Marijuana Use and Attitudes, State of Oregon,* Drug Abuse Council, December 1, 1975.

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therefore most probably related to a change of perceptions about the potential health consequences of marijuana.

Interview Results

Perceptions of usage patterns were elicited from criminal justice system officials and others with substantial experience or contact with the drug-using public. A majority of officials in every state perceived no significant change in use, either an increase or a decrease. Although in a number of states the fear had been specifically expressed that decriminalization would cause both an influx of marijuana users from other states and an increase in use among current residents, this increase was not perceived to have occurred. These perceptions are, of course, only subjective and may not properly reflect actual patterns. Nevertheless, they give an informal indication of changes in the extent of use.

As in any study, certain qualifications are necessary. Los Angeles was an exception to our general findings. Los Angeles police officials felt that use was increasing, and this increase was attributed in part to a change in the California law. Also, public officials are most likely to see changes that occur in heavy use, sale, and public use and are least likely to observe changes in experimentation or limited private possession and personal use. Therefore, these conclusions are least applicable to the experimental user.

Nevertheless, on the basis of both our objective and subjective interviews and fact-finding, it appears that reduced criminal penalties for possession do not generally lead to an immediate increase in total marijuana use, although the long-term effects of penalty reductions are less clear. The apparent short-term stability of use in the face of penalty reductions implies that harsh penalty structures do not in themselves deter personal possession and private use of the drug. This conclusion is supported by public polls, discussed in Volume 3, Chapter II, which indicate that fear of arrest is not usually given as the primary reason for not using marijuana. However, penalty reductions may cause, as well as symbolize, changes in public moral and social attitudes, which over time result in an increase in use. Although the Oregon data may show such a change, it is difficult to determine whether this phenomenon does in fact typically occur.

Impact on Public Use

Two primary issues are involved in the impact on public use:

- Does decriminalization result in loosened behavioral restraints that increase irresponsible and dangerous behavior, such as driving while intoxicated?

- Does marijuana decriminalization result in an increase in public intoxication and offensive behavior?

These concerns have been frequently expressed in the debates about marijuana policy. For example, Colorado specifically included a section in its marijuana law that provided more stringent penalties for public possession than for private possession because of these concerns.

The first concern, dangerous driving, is difficult to measure, because no efficient and inexpensive method exists to determine marijuana intoxication. California was the only state that statistically showed increased experience with intoxicated driving. Arrests for driving under the influence of any drug increased 46 percent for adults and 71.4 percent for juveniles[1] during the first half of 1976 over the first half of 1975. However, the validity of these data is uncertain because the data (1) refer to all drugs and are not differentiated for marijuana; (2) may reflect the purely demographic phenomenon in California of an increase in individuals coming into the driving age group; and (3) may reflect a change in arrest charge emphasis under the new law from possession to driving while intoxicated. For this reason, and because the law has been in effect such a short time, the California data do not suggest a strict causal relationship between the new law and the increase in drug-related traffic arrests. Nevertheless, this trend is disturbing and merits close scrutiny.

None of the other states in the study had statistical information available on the relationship between marijuana and traffic offenses.[2] Law enforcement officials did not describe any increased experience with this problem, although again it must be remembered that tests for marijuana intoxication are not widely available.

In terms of increased offensive use of marijuana in public, none of the states studied perceived this as a problem. Oregon did report some initial difficulties with public use by young people; however, this did not seem to be permanent. In all states (with the exception of Texas), the number of arrests for marijuana possession appears to have diminished[3] subsequent to the effective date of the penalty reduction law. This decrease is probably a result of lessened law enforcement interest, although it may also provide partial corroboration of a lack of increase in public use.

In summary, insufficient time has elapsed since the revised laws went into effect although there is no indication as yet of substantial increase in public use or display of marijuana, nor are there sufficient data on the relationships between reduced penalties and dangerous driving. In fact, this latter area is the primary one where many believe additional research is warranted.

Impact on the Health Care System

The impact of the recent increase in marijuana use on the nation's health care system is extremely hard to measure. Despite the widespread use of the drug, very little evidence exists of the adverse physiological effects once feared. However, if even a small percentage of the estimated 9 million regular users are affected adversely, this must have an effect on the overall health care system.

Recent data from the National Institute on Drug Abuse suggest that 5 percent of persons in federally supported drug treatment programs identify marijuana use as their primary drug problem. The figure may well be higher in state and locally supported programs, which tend to be oriented more towards non-narcotic drug users. However, in a NIDA survey of patients listing marijuana as their primary drug of abuse, the overwhelming majority stated they were in treatment only because it was offered as an alternative to jail. A few individuals clearly had emotional problems, but it is difficult to assess whether marijuana was contributing or merely incidental to their other difficulties. Overall, it appears the number of individuals in drug treatment programs for marijuana-derived problems is negligible.

The extent to which marijuana use contributes to broader physical health problems is similarly hard to quantify, but marijuana appears to have little effect. However, as today's younger and regular marijuana users become older, impacts may become visible. Most likely, the effects will occur in the area of pulmonary problems, where the evidence suggests that the ingestion of marijuana into the lungs may have damaging effects similar to those associated with tobacco.

Few data exist on the number of acute panic or other emotional reactions that are occurring secondary to marijuana use and that require clinical intervention. As the drug using population has become more sophisticated, these problems are increasingly handled within the peer group social settings rather than through professional consultation. Paraclinical "rap centers" or "crisis intervention centers" are the preferred facilities for those who need more help than their friends can provide. In general, these facilities are effective in handling the adverse psychological reactions to marijuana.

Our interviews indicated no perception among health officials of increases in acute effect contacts with health facilities. This stability is consistent with our usage pattern findings which indicate little increase in use in most areas, although other factors may be involved, such as a reduction in panic reactions resulting from increased familiarity with the drug.

In summary, the overall short-term impact caused by adverse health reactions of marijuana use on the health care system is likely to be minor, even with broad-scale decriminalization. Longer-term impacts, however, cannot be conclusively determined at this time.

The courts often suggest or mandate a diversion to drug treatment facilities in lieu of incarceration, although practice varies significantly among states. Of the states that reduced penalties, California and Minnesota report substantial reductions in the number of marijuana users who use health facilities and in the costs to those facilities. In 1973, a drug offender diversion program was legislatively authorized in California which encompassed the majority of marijuana possession offenders. Since the decriminalization law became effective on January 1, 1976, diversion is no longer used for simple possession. In the first half of 1975, 61.5 percent of all marijuana possession defendants were diverted; in the first half of 1976 this figure dropped to 20.6 percent with related decreases in costs.

Minnesota did not have a formal diversion program before decriminalization, although the courts did have an education or treatment option. Although no exact diversion data exist, the Minnesota Behavioral Institute estimates treatment cost savings of approximately $2, 877, 000[4] as a result of replacing the previous treatment diversion with the mandatory 4- to 5-hour educational program under the current law.

These data suggest that in states or localities with diversion programs, decriminalization reduces costs to the health care system by eliminating this diversion. This is also consistent with federal priorities:

> While the number of heroin-using clients referred to treatment by the criminal justice system should increase, the number of casual or recreational marijuana users referred for "treatment" as an alternative to jail should decrease in order to reserve limited treatment capacity for those who need it more.[5]

Impact on Criminal Justice System

The impact of marijuana laws on the criminal justice system is reviewed separately for the law enforcement system; prosecution, public defender, and court system; and corrections system.

Law Enforcement Resource Impact

Marijuana law changes can affect the law enforcement community by changing both the number of arrests, and the arrest procedures. Most states that have passed decriminalization laws report a reduction in arrests subsequent to the effective date of the law (see Table IV-3). This impact, however, is not uniform. Maine reports a significant reduction in arrests; Oregon has reported essentially no change in their arrest patterns during the year following decriminalization.

In general, however, actual arrest changes are difficult to assess because:

- Marijuana arrests have begun to decrease nationally (e.g., from approximately 445,000 in 1974 to 415,000 in 1975). Therefore any perceived state-level reductions may reflect overall trends based upon reordered enforcement priorities rather than the effects of decriminalization itself.

- The decriminalization laws have not been in effect long enough to warrant definitive conclusions.

- Decreased arrests may be understated in those states where marijuana offenders were charged with other lesser penalty crimes (such as disorderly conduct)

TABLE IV-3

MARIJUANA ARRESTS

JURISDICTION	TIME		CHANGE
California (1/1/76)	First Half, 1975 24,351	First Half, 1976 12,913	–47.0%
Columbus, Ohio (11/21/75)	1975 899	1976 690	–23%
Denver, Colorado[1] (7/1/75)	1974 2,413	1975 1,434	–40.6%
Texas[2] (8/27/73)	1973 19,266	1974 24,327	+26.0%
	1974 24,327	1975 23,602	– 3.0%
Minnesota[1] (4/10/76)	1975 4,409	1976 (est.) 2,500	–43.3%

[1] All adult marijuana offenses.

[2] All adult marijuana offenses. Texas did not decriminalize but reduced the penalty from a felony to a misdemeanor in 1973.

to avoid the relatively more severe marijuana penalties.

- Decreases may be overstated if, as in California, a person who was previously charged with marijuana possession as the primary offense is now charged with a nonmarijuana offense as primary.

- Altered marijuana arrest practices may have begun early in anticipation of the changes in the law.

Nevertheless, the data from many decriminalized states do indicate a decrease in arrests subsequent to the new law. This change probably reflects changes in enforcement activity rather than usage. In any case, marijuana enforcement costs have certainly decreased; the only question is by how much.

The second major potential savings in police resources results from altered police arrest procedures. These savings appear to be highly dependent on the exact specification of the law. In particular, those states that have a mandatory citation procedure are likely to save more than those states in which the complete arrest "package" (which usually includes arrest, accompanying the suspect to the station, booking, fingerprinting, and temporary incarceration pending release on bail or personal recognizance) is used. Under a citation provision, police are not removed from the field and may simply issue a summons, confiscate the marijuana, and continue with their other duties. Savings resulting from citation procedures are of course determined by the specification of the law rather than by decriminalization per se.

Whether the citation provision is optional or mandatory may be an important distinction. In some states where the citation is only optional, such as Ohio, the police do not uniformly use it, thus incurring additional cost in these instances.

Savings generated by changed arrest procedures are difficult to quantify because of the complexity of daily police routine. No data were available specifically on this issue. Nevertheless, it is clear from extant data and the subjective perceptions of officials interviewed, that the combination of reduced arrests and simplified procedures can and has generated substantial savings in most decriminalized states. California, for example, estimates a reduction in law enforcement costs from $7,600,000 in the first half of 1975 to $2,300,000 in the first half of 1976, for a savings of $5,300,000 or 70 percent. Similarly, Minnesota estimates a reduction in police costs of approximately $100,000.

An indirect effect of the decriminalization laws on the law enforcement community, which some feared, was the loss of a useful bargaining device. For example, the elimination of criminal penalties for possession could also eliminate the effectiveness of plea bargaining in gaining access to major drug traffickers, thus increasing the costs of reaching these individuals. The extent to which this has happened is unclear, however.

In summary, substantial savings in law enforcement costs can occur as a result of decriminalization. The magnitude of these savings, however, depends upon the extent to which police enforce the new law and the specific features of the law relating to police procedures (e.g., citation provisions).

Prosecution, Public Defender, and Court Resources Impact

As in other areas, the exact extent of savings from decriminalization is difficult to measure, since changes in prosecution may have occurred prior to the effective date of the law, the laws have been in effect only a short time, and most court systems do not maintain marijuana-specific data. Generally, however, the impact in the judicial system (i.e., the combination of prosecution, public defenders, and courts) occurs in three ways:

- Change in the number of individuals entering the system. As described previously, the number of marijuana possession arrests generally decreased subsequent to the passage of decriminalization, which naturally results in a decreased court caseload with consequent cost savings.

- Change in defendant response. A change in defendant response has also resulted in substantial judicial system resource savings. Because in most cases the defendant is no longer faced with a permanent criminal record or incarceration, all states report a reduction in contested guilt. As a result, the court system avoids evidentiary hearings (on suppression motions) and lengthy trials. The majority of defendants simply plead guilty and are sentenced at arraignment.

- Change in judicial system procedures. Savings resulting from changed judicial system procedures are more variable. In some states, such as Maine, the prosecution has reduced its effort; in other states, such as Ohio, all cases routinely continue to be fully prosecuted. Savings could also occur through the use of a noncourt fine system, such as that used in traffic offenses: a given amount is simply submitted by mail if guilt is not contested. Although such a system is not excluded under the provisions of many of the decriminalization laws, it has not yet been used widely in any state.

The only state to attempt an evaluation of actual court system savings is California. Including prosecutor, public defender, probation, and court costs, but excluding court disposition costs, the total cost for marijuana offenses in the first half of 1975 was approximately $9.4 million and about $2 million in the first half of 1976, for a savings of more than $7 million or 78 percent. Although Colorado does not have similar cost figures, total drug and narcotics cases (of which the majority are marijuana related) have dropped substantially in recent years.

In Minnesota, the Minnesota Behavioral Institute estimates that the new law has produced judicial system cost savings of at least $500,000. The other decriminalized states exhibited similar decreases in court resource use and costs.

Corrections System Resources Impact

All eight states reducing penalties have eliminated incarceration for first offense simple possession of marijuana. However, because incarceration was rarely used for such offenses before the changes, the decrease in the number of offenders incarcerated has probably not been substantial, although clearly in those situations where detention can be eliminated, cost savings do occur. States which use a citation system rather than a full arrest procedure do save on incarceration costs by eliminating prearraignment detention. Since most incarcerations for marijuana offenses occur in local and county jails rather than in state institutions, the actual extent is difficult to determine. (In fact, no state had such data readily available at the state level.)

PROCESS OF CHANGE FINDINGS

A major aspect of this study involved examination of the factors that affected the passage or defeat of legislation reducing marijuana-related penalties. This task required the identification of the personal and political forces which shape such legislation. An understanding of these forces is of value to state policymakers who are considering change in their own states.

Political Positions

Decisionmakers on the marijuana issue held a wide variety of positions, which differed from state to state and from individual to individual. Nevertheless certain views were widely held; some positions were nearly universal among supporters and opponents of decriminalization.

The positions most widely held by supporters were:

- Occasional marijuana use has not been found to be seriously harmful and therefore severe penalties are not justified.
- Criminal justice system resources should be used for more serious crimes.
- Incarceration and a permanent criminal record are too harmful to the marijuana user who has committed no other crime and only participated in an activity undertaken by many of his peers.

The positions most widely held by opponents were:

- Marijuana is physically or psychologically harmful and therefore should be prohibited.
- Marijuana use leads to the use of other drugs.
- Marijuana use leads to other criminal activity.
- Decriminalization would be a signal of societal approval and therefore would lead to increased use, particularly among the young.

Although the National Commission on Marihuana and Drug Abuse discounted the relationship between marijuana on one side and "harder" drugs and criminal activity on the other, opponents of reduced penalties have consistently cited contrary viewpoints or public positions. For example, the International Association of Chiefs of Police has stated:

> As the branch of government which most frequently encounters the abuser of illegal substances, the police have readily seen the matriculation from cannabis to more dangerous and potent narcotics combined with an increase in crime and useless destruction of human life.[6]

Interestingly, opponents of the decriminalization concept only infrequently mentioned the possibility of secondary effects such as vehicular or occupational accidents as a reason for their opposition. A moral stance against the use of marijuana was mentioned fairly frequently.

Political Implications of Decriminalization

Perhaps of primary importance to elected officials is whether support for or opposition to decriminalization has proved to be a political liability. This question is complex because the political impact of an issue is dependent upon a number of factors, including:

- the political philosophy of the politician's constituency;
- the visibility of the issue in terms of media coverage;
- the number of other concurrent major issues that draw attention from or to the issue in question;
- the virulence of the debate on the issue; and
- the politician's history and status in the political hierarchy.

As a part of this study, interviews were held with elected public officials or their representatives, including legislators, Governors, attorneys general, and local officials. Care was taken in the selection of the states for analysis not only to include those with relevant marijuana laws, but also to develop a sample that was politically and geographically disparate. In this way it was possible to determine whether the political consequences of a given position on the marijuana issue differed depending on the state or region.

In the course of our interviews, elected officials were asked about the direction and strength of constituency reaction to their position, both in terms of correspondence received and in terms of their perception of voter reaction at the polls. Attempts were also made to get subjective reactions to general public opinion on the subject.

In addition, the general political environment in which the marijuana debate took place was assessed, including the legislative context of the marijuana bill, the political strengths of supporters and opponents, and the role of the press in affecting the legislative process.

Although it was found that the majority of the legislative supporters of decriminalization tended to be from urban or suburban communities or from special interest districts such as college communities, it was found that this was by no means universally true. Many supporters were also from rural communities or from districts that were considered conservative on similar issues. Similarly, opponents of decriminalization represented a wide variety of constituencies ranging from conservative rural districts to minority urban districts.

Supporters of decriminalization were more likely to voice apprehension over the political consequences of their position than were opponents. They also were more likely to prefer that the debate receive minimal public scrutiny. Again, however, these generalizations were not universally true. Some supporters felt that the public would accept arguments on that side of the issue and were not apprehensive about making their position known.

In spite of the variability in constituency philosophy, both within and among states, and in spite of apprehensions by decriminalization supporters, this study found that the political liability of a strong position on marijuana policy has been overrated as an issue.

None of the elected officials or their representatives whom we interviewed reported a strong public response to their position,

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whether it was for or against decriminalization. Most indicated receiving only a small number of communications on the issue, and these communications were divided fairly evenly between approval and disapproval.

The ingredients of political victory and defeat are complex and therefore causality and lack of causality are difficult to assess. Nevertheless, no political defeat or victory was identified during the interview process which was attributed principally to a position on the marijuana issue.

In the Louisiana attorney general's race, the incumbent attorney general was highly vocal in his support for decriminalization, and this was made a major campaign issue by his opponent. However, the incumbent won and did not feel that the outcome of the election was affected by the marijuana issue. Other races, such as several for House seats in Iowa, were extremely close; yet the marijuana issue did not become important for either side.

These results indicate, then, that a position on the marijuana issue did not generally constitute a political liability. This appears to be true regardless of the geographical location or political philosophy of the state.

Common Patterns of Process

While each state surveyed underwent deliberation and change somewhat differently, some patterns were in evidence:

- The active support of legislative leaders was crucial in those states that successfully passed legislation reducing penalties. This support was missing in those states where legislation was introduced but defeated.

- In those states where decriminalization legislation passed, the law enforcement agencies either did not take a strong position, were split on the issue, or were satisfied with certain compromises in the law. In both California and Colorado, the district attorneys association provided support that was influential in the passage of the bill.

- The relationship of the marijuana legislation to related pending bills varied significantly. In Ohio and Maine, decriminalization was part of an overall revision of the criminal code. In Ohio, this helped minimize any adverse reaction by the public; in Maine, it gave the decriminalization bill the added credibility of the support of the revision commission.

However, in Colorado and California, the decriminalization bill was presented and passed without being a part of a large bill. And in at least two states, Iowa and New Jersey, decriminalization legislation failed in spite of the potential for inclusion in a general criminal code revision.

- The severity of the existing penalty structure provided the impetus for change in California and Colorado. In Minnesota, the fact that previous reductions in marijuana penalties had occurred without severe consequences was considered important to the passage of the bill.

- In some instances, the extent of background research on the marijuana issue undertaken by policymakers or their staff was directly related to the success of the bill; such extensive work was done in Maine, California, and Ohio (which passed legislation) but not done in Iowa and Louisiana (where legislation failed). However, in New Jersey, nearly every major drug-related agency, as well as the legislature, undertook marijuana studies, but no significant legislation was passed.

- Generally, the study indicated that the Governors of the nine states did not play a significant role in the debate on the issue or with respect to the bill's final outcome. This neutral stance, however, was important, in that the threat of veto was, in most cases, clearly absent and the "signal" from the Governor indicated generally tacit support or willingness to accept the legislative decision.

- The perceived and publicized success of the Oregon law was significant and well-known in each state surveyed.

- In three states--Minnesota, Ohio, and California--individuals and/or public interest groups were significant in the decriminalization process. Generally, however, internal legislative debate and decision-making was more important.

- In each state surveyed, the press generally reported the legislative deliberations objectively. A majority was supportive of the decriminalization effort editorially. However, this was true in states which did and did not pass decriminalization legislation. Most legislators indicated, however, that the press reaction was not influential in formulating their position.

- Generally, state agencies did not play an important role, either supportive or critical, in the decriminalization effort. In some states (e.g., Maine and Minnesota), however, they did provide information. One exception is New Jersey, where both the Department of Health and the Attorney General's Office took positions supporting decriminalization legislation, which to date has been unsuccessful in the legislature.

FOOTNOTES

[1] A First Report of the Impact of California's New Marijuana Law (SB95), State Office of Narcotics and Drug Abuse, December 1976.

[2] The U.S. Department of Transportation conducted a study of 300 fatal traffic accidents in Boston from 1971-1974, in which 16 percent of the drivers admitted to or were said to have been smoking marijuana within 3 hours of the accident, although more than 50 percent of these had also been using alcohol or some other drug. The findings are reported in a three-volume report available from the National Technical Information Service, Springfield, Virginia, 22161:

I. Psychosocial Identification of Drivers Responsible for Fatal Vehicular Accidents in Boston.

II. An Analysis of Drivers Most Responsible for Fatal Accidents vs. a Control Sample.

III. Marijuana and Driver Behavior; Historic and Social Observations Among Fatal Accident Operators and a Control Sample.

Contract No. DOT HS-310-3-595, May 1976.

[3] Data are inconclusive on Ohio.

[4] This figure is based upon extrapolation from national figures for percentage of treatment monies spent on marijuana offenders in treatment programs, rather than on specific data from Minnesota.

[5] Strategy Council on Drug Abuse, Federal Strategy, Drug Abuse Prevention, November 1976, p. 43.

[6] Glen D. King, Executive Director, International Association of Chiefs of Police, letter dated November 11, 1976.

V. A GUIDE TO POLICY DECISIONMAKING

This chapter provides a "drafter's guide" for policymakers (whether executive or legislative) who have concluded that some portion of marijuana-related behavior should be decriminalized--meaning that traditional criminal penalties for consumption-related behavior should be substantially reduced. Field interviews during this study demonstrated that neither legislators nor criminal justice personnel share a common conception of the precise content of "decriminalization," which is to say, of course, that the meaning of the "criminal" sanction itself is ambiguous. For current purposes, however, the term will be employed to refer to a threshold concept rather than a definitional one: decriminalization is any statutory scheme under which the "least serious" marijuana-related behavior is not punishable by incarceration.

Incarceration is a useful threshold device because the elimination of the possibility of imprisonment and its attendant social stigma reflects a significant change in official attitudes toward marijuana offenses, because "total confinement" is a sanction different in kind, not only in degree, from other legal sanctions, and because the lesser sanction suggests or requires a less severe and less elaborate application of "criminal" processes.

Beyond this threshold, many important questions must be resolved. These questions fall into two general categories:

(1) What behavior should be "decriminalized"? Only possession of small amounts? How small? Gifts of small amounts to friends? Non-profit "accommodation" sales to friends? Cultivation of a few plants in the home?

(2) What residual sanctions, if any, should be retained to implement the state's interest in discouraging that behavior? Behavior that is "decriminalized" may or may not remain subject to lesser sanctions. In each of the eight states which have already enacted "decriminalization" reforms, the behavior in question is still punishable by a fine. In some of those states the behavior is still labeled a "criminal offense"--but even in some of these a person "convicted" of the offense has no "record." Should the commission of a decriminalized offense be punishable by a monetary penalty? By participation in some educational or counseling program? Should the person be booked and taken into custody after detection of a "decriminalized" offense? Should such a person be stigmatized by an "arrest" or "conviction" record?

DEFINING DECRIMINALIZED OFFENSES

Assuming that some, but not all, marijuana-related behavior is to be decriminalized (or at least that penalties should be substantially reduced), policymakers must define precisely which behavior is no longer subject to the criminal sanction. Several methods may be used to determine the area of marijuana-related behavior for which the criminal sanction is deemed appropriate. The polestar by which legislators should be directed in choosing among these alternatives is the impetus behind the drive for decriminalization. Thus, if, for reasons of fairness, justice, or institutional integrity, the goal of reform is to withdraw the criminal sanction from mere consumers of marijuana, the statutes should be revised in a way that most accurately distinguishes between consumption-related activity and commercial activity. On the other hand, if the goal of reform is primarily to promote the efficient administration of criminal justice by lightening the burden imposed by the processing of petty marijuana cases, the issues raised below may be resolved by restricting decriminalization to the narrowest range of behavior consistent with this goal.

For the most part, drug offenses are separately defined for possessory conduct, distributional conduct, and manufacturing (cultivation). Legislators have traditionally recognized that possessory activity may be indicative of either intended consumption or intended distribution depending on the amount possessed and other indicia of intent. Similarly, legislators have been sufficiently aware of the patterns of marijuana use that they have distinguished since the late 1960s between gratuitous (or nonprofit) transfers among friends and purely commercial activity. A similar distinction may be drawn between forms of cultivation which may range from growing one plant in a window box to a large scale agricultural enterprise.

The material below will sketch the drafting alternatives for defining decriminalized or least serious marijuana-related behavior in three parts: possessory conduct, noncommercial transfers, and noncommercial cultivation.

Possessory Conduct

Traditionally the possession offense has been divided into at least two gradations: simple possession and possession with intent to sell. The penalties authorized for the latter category are more severe than those authorized for the former. In addition, a clear-cut legislative trend in recent years has been to dispense with proof of intent and to substitute gradations of amount with correspondingly graded penalties.

Thus in discriminating between less serious and more serious possessory activity, legislatures have two devices at their disposal--intent to sell and amount possessed--which can be combined in several different ways. The following discussion will present various options and will assess the relative merits of each.

The Pure Intent Approach

This approach decriminalizes possession of any amount of marijuana unless the prosecution proves intent to sell. The principal advantage of this approach is that it mirrors the essential difference between commercial activity[1] and possession for personal consumption. The primary drawback is that the prosecution very seldom has any independent evidence of intent to sell and therefore usually relies on inferences from the amount of marijuana possessed.

The pure intent approach, by not utilizing a "bright line" distinction ("bright line" refers to the amount level used to legislatively distinguish between simple possession and possession with intent to sell), does little to reduce the cost or enhance the fairness of enforcing marijuana prohibitions. The user cannot reap the benefits of decriminalization, unless he is able to adjust his conduct with assurance that he will avoid criminal sanctions. Even if lesser sanctions remain applicable to noncriminal possession, criminal justice resources may be unnecessarily squandered, because the police cannot recognize the decriminalized offense. Eventually the communication of prosecutorial charging guidelines can solve this problem. But defendants charged with criminal possession are more likely to go to trial under the pure intent approach, because the prosecutor must prove actual intent--a much harder task than proving that the amount possessed was above a certain quantity. Since the defendant has a greater chance of prevailing under the pure intent approach, the prosecutor will not possess as much leverage to plea bargain.

A variation of the pure intent approach which would increase the prosecutor's leverage is to shift the burden of proof to the defendant. Under this scheme, possession of any amount is presumed to be criminal unless the defendant proves that the possession was solely for personal use.[2] The primary objection to this approach is that it is subject to serious constitutional challenges.

A Virginia statute that classified possession as a misdemeanor and intent to sell as a felony was held unconstitutional on substantive due process grounds, because it created a rebuttable presumption of intent to sell from the possession of any amount of marijuana.[3] The court

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stated that no rational connection existed between the proved fact (possession) and the ultimate fact to be established (intent to distribute).

The second type of constitutional attack that has been leveled against similar statutes is that the presumption violates the privilege against self-incrimination. The argument is that since the presumption concerns the accused's state of mind, the only way he can rebut the presumption is to testify himself. Thus the presumption forces the defendant to take the stand; if he exercises his constitutional right to remain silent, the presumption will require the jury to draw the inference of intent to sell.[4]

The final constitutional impediment to the creation of the presumption is that it may violate the Due Process Clause of the Fourteenth Amendment by shifting the burden of proof to the defendant, thereby destroying the presumption of innocence.[5]

None of the eight states that have adopted decriminalization provisions employed either version of the pure intent approach.

The Pure Amount Approach

This approach would decriminalize possession below a specified amount and retain the criminal penalty for possession of any quantity in excess of that amount, without regard to intent to sell. Seven of the eight states which have decriminalized marijuana have utilized this approach. The principal advantages of this "bright line" scheme are fairness and efficiency: defining the offense by the amount possessed permits both possessors and police to know precisely what conduct is "criminally" prohibited; moreover, it gives the prosecutor greater leverage to plea bargain with those who possess above-the-line amounts.

The principal disadvantage of the bright-line method is that it may be at once over- and under-inclusive. That is, this scheme may decriminalize the behavior of some sellers who possess amounts below the line and make criminal the behavior of some consumers who possess above-the-line quantities.[6]

The Combined Approaches

If the legislature wants the advantages of the bright-line method but wishes to alleviate either the under-inclusion or the over-inclusion, a scheme may be selected to combine the intent and the amount approaches. However, the same combined scheme cannot ameliorate

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both problems. Therefore policymakers who opt for the combined method must be careful to select the one which is consonant with their decriminalization goals.

If the major impetus behind decriminalization is to remove only the most petty consumption offenses from the system, then a statute could be drafted to make possession of above-the-line amounts always criminal and possession of below-the-line amounts criminal only if the prosecution proved intent to distribute. However, such a statute would retain all of the deficiencies of the pure intent approach for possession of below-the-line amounts. That is, this statute poses problems of fairness and cost in the below-the-line cases, since in the absence of definitive prosecutorial guidelines, the seriousness of the arrestee's offense is indeterminate at the time of the offense. The main advantage of this approach is that police and prosecutors have a tool (proof of intent) to use against "dealers" who are careful to possess only below-the-line amounts. Also a "criminal" above-the-line offense gives the prosecutor a plea-bargaining tool for persons charged with possession with intent to sell.

Alternatively, if the objective of decriminalization is to ameliorate the unfairness of criminalizing an activity that is engaged in and approved by a large segment of the populace, then the legislature's bias would be to decriminalize all consumption-related behavior, and a different statute would be fashioned. Possession of below-the-line amounts would always be noncriminal, while above-the-line possession would be noncriminal unless the prosecution proved intent to distribute.

If it is feared that this approach will result in either too many commercial dealers going free or too many contested cases due to the prosecutor's reduced leverage, the legislature could shift to the defendant the burden of proving "intent" (to consume) in cases involving possession of above-the-line amounts. This variation was adopted by Maine in its decriminalization statute. A number of courts have held such statutes constitutional on the ground that a rational relationship exists between the proved fact (the amount possessed) and the presumed fact (intent to distribute).[7] It is essential to distinguish the statute that creates the presumption of intent for possession of above-the-line amounts from the one that creates the presumption for any quantity. The case for finding no rational connection between the proved fact and the presumed fact is much stronger in the latter instance.[8] Nonetheless, at least one court struck down a statute that established a presumption of intent to sell with possession of more than 2 ounces of marijuana.[9] The court held that the presumption, even when only applied to above-the-line amounts, shifted the burden of proof to the defendant, destroyed the privilege against self-incrimination, and violated the due process clause, since there was no rational connection between the proved fact and the presumed fact.[10]

The advantage of this latter approach over the pure amount approach is that it provides the possessor with an opportunity to contest the "presumed" fact--intent to distribute. Thus the person who possesses marijuana for personal use only in amounts near the borderline will not be punished if the quantity is slightly in excess of the designated amount. The disadvantage is that intent to distribute will be part of the prosecution's case in every trial, even when the police are convinced that it was not intended solely for personal use. Thus trials will be more complicated (and more expensive), and some retail dealers may be able to avoid serious sanctions even if they are detected.

If policymakers wish to alleviate this problem and at the same time retain the advantage of the modified approach, a statute creating a "buffer zone" might be drafted. This scheme would set two amounts, X and Y. Possession of less than X would never be a criminal offense, while possession of more than Y would always be a criminal offense. Possession of more than X but less than Y would be criminal only if the prosecution proved intent to sell.[11]

Amount Designations

Assuming that a state has decided to decriminalize some marijuana-related behavior and that the state will implement that choice through the vehicle of one specific amount line, two subsidiary questions must be answered: (1) where should the amount line be drawn? (2) should a distinction be drawn between public and private behavior? In analyzing the spectrum of choices available to the states, it will be useful to the state policymakers to examine how the eight states which have recently adopted decriminalization measures addressed these issues, which is described in the Volume 3 case studies.

Drawing a statutory amount line will necessarily be somewhat arbitrary. It is obviously clear that a person possessing over a kilogram of marijuana is intending to sell it and that one in possession of less than half an ounce is holding it for his personal use and that of his friends. Between these extremes, however, there is no precise line for decriminalization which is *a priori* more appropriate than another.

Nonetheless, the precise line should be selected with the specific goal of decriminalization in mind. If the goal is merely to cut down on the most petty "nuisance" arrests and to retain the criminal sanction for as much marijuana-related conduct as possible, then the amount should be relatively small. One ounce would appear appropriate, since between 90 and 95 percent of all arrests are for simple possession, and of these, approximately two-thirds are for 1 ounce or less.[12] Thus decriminalizing possession of 1 ounce or less would clearly result in a considerable savings in terms of police and court time. The 1 ounce approach would also conform to current retail distribution patterns of marijuana.[13] Of the eight states which have decriminalized some marijuana-related behavior, five states draw the line at 1 ounce;[14] two others draw it at 1-1/2 ounces.[15]

If, on the other hand, the purpose of decriminalization is to approximate the distinction between commercial and consumer behavior, a higher amount seems justified. Unfortunately available data are not responsive to any effort to distinguish a seller from a user on the basis of the amount possessed. However, from both free access studies (where marijuana users are kept under observation and told to smoke as much as they wish) and survey studies (in which users are asked how much marijuana they consume), it is known that even a heavy user would not use more than an ounce of marijuana in a week.[16] Nevertheless, it is probable that those engaging in strictly consumer activity (including casual, not-for-profit distribution to friends) would be in possession of amounts well in excess of 1 ounce. This is because marijuana is usually smoked communally; thus possessing more than 1 ounce does not necessarily mean it is intended for sale. If the policymakers' bias is to err on the side of decriminalizing most consumption-related behavior, perhaps Ohio would be an appropriate example; Ohio decriminalized possession of less than 100 grams (which is a little more than 3-1/2 ounces).

One problem which the higher amount line leaves unresolved is that of the commercially-oriented retailer who only carries amounts of 4 ounces or less but returns frequently to his source. A remedy for this situation would be the "buffer zone" statute described above. Thus possession of less than 1 ounce would be decriminalized and possession of over 4 ounces would remain a crime; possession of an amount in the "buffer zone" would be a crime if the prosecution proved intent to sell.

The Potency Problem

Once the legislature has decided upon an amount (perhaps 4 ounces) the question remains "4 ounces of what?" Cannabis is a plant, and different parts of the plant contain the psychoactive substance, delta-9-THC, in different proportions. The drug content in various parts of the plant is variable, generally decreasing in the following sequence: resin, flowers, and leaves. Almost no THC is contained in the stems, roots, or seeds.[17] In addition, the level of THC varies among plants, depending upon agricultural conditions. Thus Mexican-grown marijuana usually contains 1 percent THC by weight; Colombian or Jamaican marijuana can go as high as 3 to 5 percent; and marijuana grown domestically almost always contains less than 1 percent.[18] "Marijuana" refers to a preparation of the flowers, leaves, seeds, and small stems; "hashish" contains only the resin and flowering tops of the plant, and its potency may range from 0.1 percent to 14 percent.

Because of the varying amounts of the psychoactive ingredient contained in various preparations of the drug, it has been suggested that a decriminalization scheme distinguish between more and less potent preparations to exert a greater deterrent to using the more potent ones. Two methods of making this distinction have been proposed:

- The Potency Approach. Under this method, criminal liability would depend upon the percentage of THC contained in the particular preparation. Possession of less than 4 ounces of any cannabis would no longer be a crime if the potency were, for example, less than 1 percent. Possession of any amount containing more than 1 percent THC would remain a crime.

- The Form Approach. This approach would decriminalize possession of 4 ounces of marijuana and retain the criminal sanction for any amount of hashish.

These two approaches are discussed below.

The Potency Approach

This approach poses three basic problems: fairness, cost, and frustration of the goals of decriminalization. The fairness aspect is seen in the fundamental requirement of our criminal law that actus reus and mens rea coincide; that is, a person is generally not held criminally liable unless he has the intention to commit the proscribed act. A person smoking marijuana clearly cannot know the potency of his supply, and therefore a potency distinction would impose the criminal sanction on those who could not have known that they were committing a crime.[19]

The cost of the potency approach is also a barrier. Implementation would require that each police department equip its chemical laboratories for THC assays. Scientists at the National Institute on Drug Abuse suggest that it is now technologically feasible to assay every compound seized, but that the cost would be prohibitive.[20]

The most serious indictment which can be leveled against the potency approach is that it will frustrate the goals of decriminalization. It would always be possible that any marijuana sample contained an excessive percentage of THC. Therefore the police theoretically would have to apprehend all persons possessing marijuana and send the drug to the lab for analysis. This would result in a greater, not a lesser, expenditure of scarce police resources in enforcing marijuana laws. In addition, the potency approach does not distinguish the commercial seller from the consumer. The potency approach would also retain the potential for harassment and selective enforcement that plagues the current system. Since the possessor would be in a legal limbo pending outcome of the assay, a number of procedural problems would be presented. The courts would have to decide, for instance, whether custody of the possessor were authorized pending the analysis.

Finally, the potency distinction would apparently be much ado about nothing. In the past several years, the Drug Enforcement Administration has analyzed street samples of marijuana compounds. The mean potency has been 0.6 percent, and virtually every sample has fallen in the 0.5 percent to 1 percent range.[21]

Apparently the policymakers in each of the eight jurisdictions that have enacted decriminalization provisions were convinced of the merits of the arguments against the potency approach, because none of the states adopted it.

The Form Approach

The form approach has two problems: one definitional and one substantive. The definitional problem has largely been ignored. The 1972 National Commission on Marihuana and Drug Abuse noted that while nine states at that time distinguished between marijuana and hashish for punishment purposes, only Virginia defined hashish:

> The resin extracted from any part of the plant cannabis sativa, whether growing or not, and every compound, manufacture, salt derivative, mixture or preparation of such resins, or any resin extracted from the mature stalks of said plant.

The National Commission continued:

> Naturally, the key word is "resin." But rather than representing a clear physical distinction, "resin" is merely a convenient label for describing certain substances exuded by many plants, all of which have certain properties in common. For example, they are brittle in solid form and melt when heated.
>
> The problem is that "marihuana" mixtures contain some resins and "hashish" preparations often contain plant parts other than resins. So, for legal purposes, resin is not the only factor. How could it be defined? Predominantly resin? Substantially resin? Any such formulation might well fall to a vagueness attack.[22]

The substantive challenge arises from the fact that there are weak samples of hashish that contain less THC than some strong marijuana compounds.[23] Although the DEA has located hashish samples that contain as much as 14 percent THC, the mean of the samples was 2.6 percent. Moreover, two-thirds of the preparations analyzed were below this mean percentage. The person possessing weak hashish might successfully mount a due process challenge to a statute that punishes him while permitting the person possessing a more potent marijuana mixture to escape criminal liability. Moreover, the distinction serves no rational purpose. It clearly does not separate sellers from consumers; and since there is very little potency distinction between the mean sample of each form, the distinction cannot be justified on the potential for disparate effects on health.

Despite these objections, five of the eight states that have decriminalized some marijuana-related behavior have nonetheless retained the criminal sanction for possession of hashish.[24] In addition, South Dakota, while decriminalizing possession of 1 ounce of marijuana, retained the criminal sanction for possession of over 10 grams of hashish (about one-third of an ounce).

If policymakers are determined to exert a greater deterrent against the use of the most potent preparations, a more sensible approach would be to distinguish between hash oil and other forms of cannabis. Since hash oil is in liquid form, such a distinction would be a facile one to make, both for users and for police. Furthermore, there is a significant difference in terms of average potency between hash oil and the other two forms of the drug. Although nearly all samples of both marijuana and hashish contained less than 3 percent

THC, the lowest potency found for hash oil is 10 percent, and the mean is 17 percent. Of the two states which decriminalized possession of "hashish" as well as that of marijuana, only Ohio excluded hash oil from the decriminalization provisions.

The Location Problem

The final issue to be addressed regarding possessory activity is whether a distinction should be drawn between public and private behavior. To the extent that "decriminalization" is designed to conserve enforcement resources and to preserve values of privacy by reducing the likelihood of intrusion by law enforcement in the home, a strong case can be made for reserving any residual sanction (e.g., fines) for only public behavior. Public behavior would include public use (which should be penalized in any event like public use of alcohol is in most jurisdictions) and possessionof less than the specified amount in public (which should be defined to include possession in moving vehicles).

The main reason for excluding possession in a "private" location from the sanctioning provision is that the threat of intrusions into the home is of limited deterrent value under any foreseeable enforcement circumstances. Indeed, the overwhelming proportion of marijuana arrests under current minimal statutes occurs in the context of police patrol activities--on the street or in connection with vehicle searches. In addition, the detection of marijuana consumption in the home should be a low priority for police investigative resources in any event. An explicit decriminalization of private possession would both establish a clear legislative guideline on this point and eliminate the risk of harassment and discriminatory enforcement practices attendant to private raids.

It should be noted that retention of "civil" penalties for private possession will not eliminate these problems. If private possession of less than the statutory amount remains a noncriminal offense, users can still be apprehended in the home. Moreover, possession of a small amount might be used as a pretext for searching the home for larger amounts, or even for arrest on suspicion of possessing larger amounts. To prevent these intrusions, private possession of less than the designated amount could be excluded from the definition of noncriminal as well as criminal marijuana offenses. (Alternatively, the designated amount for private possession could be increased or replaced by a requirement of "intent to sell.") Such a statutory scheme would tend to channel marijuana use into private locations, which would have the effect of reducing the likelihood of intoxication and incapacitated behavior in public, including driving.

Only two of the states that have decriminalized some marijuana conduct have discriminated between public and private behavior. In Alaska, there is no criminal sanction for private personal use or possession of any amount (without intent to sell). In fact, it has been held that imposition of criminal liability for mere possession in private is unconstitutional.[25] Any public use and public possession of more than 1 ounce is a misdemeanor in Alaska. Colorado labels public "display" or use of cannabis as a crime. While the other six states did not address the problem of public use directly, all states have statutes prohibiting intoxication in public, and public use of any amount of marijuana would undoubtedly give the police probable cause to apprehend the individual. Nonetheless, if the legislature has decided that public use should be prohibited, that intention should be made manifest in the statute.

Distributive Conduct

As in the classification of possession, division of the sale or distribution offense into two or more categories is necessary to distinguish between commercial activity and activity that is primarily "consumption-related." Not all marijuana transactions are commercial in character. Casual transfers are commonplace in the experience of most users, partly because of the difficulty of obtaining the drug, and partly because, unlike the use of narcotics, marijuana use is a social experience. The most frequent type of transfer is probably the gift of a small amount for immediate use (e.g., when a marijuana cigarette is passed around). However, other kinds of transfers are also quite common. Collective purchases of up to 1 pound may be distributed via transactions in which each buyer pays his share of the aggregate cost. In addition, students and other users with limited income sometimes sell small amounts at a slight profit to pay for their own use.

The "casual" distribution of small amounts of marijuana is the functional equivalent of possession of small amounts of the drug. In recognition of this fact, Congress and 18 states treat transfers of small amounts of marijuana "without remuneration" or "without profit" as misdemeanor rather than felonious sales. In 1972 the National Commission on Marihuana and Drug Abuse concluded that, under the same rationale, these casual transfers should be decriminalized if they occur in private.[26]

Undoubtedly it is possible to distinguish these "casual" distributive transactions (at least on a quantitative basis) from smuggling and other commercial activity that involves large amounts of marijuana and, consequently, large profits. If, for the same reasons that have prompted decriminalization of noncommercial possessory activity, legislators wish to draw a line at some point along the spectrum of distribution activity, and to decriminalize below-the-line transfers, the primary decisions to be made are how and where to draw the line.

The "how" problem has two aspects. One is the nature of the transaction itself and the second is the amount transferred. A legislator attempting to identify consumption-related transfers might provide more lenient penalties if the transfer is a gift and does not result in a profit, or if the profit is less than a specified minimum. In terms of proof, the most convenient place to draw the line is at gifts. "Cost-only" transfers arguably should not remain criminal. However, efforts to distinguish nonprofit transactions from profitable ones will prove difficult (although not impossible, especially if evidence about current market conditions is easily obtained).[27] It is important to consider whether case-by-case adjudications on "profit" are worth the effort when only small amounts are involved.

The second relevant aspect of distribution activity is the amount transferred. A statute that employs a designated amount could avoid the proof problems by in effect creating a statutory presumption, as with possession offenses; it is also easy to amend such a statute to increase or decrease the number of offenders who will be subject to the lesser penalty, simply by increasing or decreasing the designated amount. However, the competing consideration is that retail dealers may adjust their behavior to the contours of the law, never transferring more than the specified amount.

Given the available classification devices (giftprofit and amounts), several policy choices are possible. Decriminalization of gifts only is probably the minimum revision that is consistent with decriminalization of possession. Therefore it can be argued that gifts, which are rarely detected and rarely involve substantial amounts of marijuana, should be accorded the same penalty status as possession of small amounts. Clearly the transferor is an "accommodating" user, and it can be argued that different legal consequences would be unfair.

Whether the scope of the decriminalized offense should be extended beyond gifts (i.e., to include nonprofit sales, sales of small amounts, or both) is a decision that should be guided by the fundamental goals of the policymaker. The danger always exists that decriminalization of any kind of sale will create a loophole for professional retailers. By adjusting his trading patterns so as to make many small sales instead of a few large ones, a small-time retailer might be able to continue a profitable commercial operation without risking any sanctions more severe than an occasional fine.

A policymaker whose primary goal is to decrease criminal justice costs by cutting down on prosecutions of insignificant offenses would probably want to adopt a gifts-only provision and avoid the loophole problem. Policymakers who, for reasons of fairness or compassion, are interested in withdrawing unnecessarily harsh criminal sanctions from most offenders whose activity does not pose a serious threat to public order, may want to extend the coverage of the decriminalized offense beyond gifts. Such a legislator would be aiming to remove the criminal sanction from as much unequivocably consumption-related behavior as possible while remaining consistent with a social policy of discouraging marijuana use.

If the latter policy alternative is chosen, the problem is how to design legislation that covers most consumer activity without opening a wide loophole for commercial activity. Sales are much more ambiguous than gifts. A sale of 2 ounces may be a simple "accommodation" between two users, one purchasing part of another's supply at cost; or it may be part of a large-scale, profitmaking retail enterprise. Because the amount of profit on a sale is not easily proved and is only generally related to the amount sold, the available classification methods (profit and amount) will not succeed in distinguishing every accommodation sale from every commercial sale.

The legislator must simply aim to devise a realistic classification that can be applied with reasonable convenience. One approach is to choose a relatively low amount (e.g., 1/2 ounce or 1 ounce). Another approach is to choose a somewhat higher amount and combine the profit and amount methods. For example, legislation could provide that a sale of less than 2 ounces is not a criminal offense and that a sale of more than 2 ounces is not a criminal offense if the defendant proves that he made no profit.

After an appropriate method of classifying sales has been chosen, the amount of marijuana, or the percentage of profit, must be designated that will qualify as an accommodation sale. Clearly, increasing the designated amount also increases the concern about the loophole effect; and conversely, decreasing the amount decreases the number of consumers whose customary marijuana behavior has been decriminalized. Resolution of this dilemma depends, in part, on an assessment of the practical significance of the loophole effect. Decriminalization of sales of small amounts may in fact induce retailers to decrease the risk of apprehension by adjusting distribution patterns, and it may also induce enterprising consumers to enter the marijuana trade at the retail level. But neither of these effects willl be significant unless the criminal penalties already in force, as well as those that will remain after decriminalization, have a significant deterrent effect on persons who are inclined to engage in commercial activity. The deterrent effect of criminal sanctions depends to a large extent on the level of enforcement. Thus, if enforcement of laws against commercial sale is weak and is likely to remain weak, closing loopholes is probably not as important as giving fair treatment to the few who are caught. On the other hand, if enforcement is strict, something may be gained by setting a low designated amount to ensure that retailers do not escape punishment.

Another consideration that may influence the selection of a designated amount is the importance that policymakers attach to prosecution of retailers who profit from the sale of small amounts. Obviously, a designated amount of 2 ounces cannot possibly affect the operations of dealers who customarily transfer amounts over 5 pounds. It would be much too inconvenient to divide up a transaction of that magnitude into enough separate transfers to qualify as decriminalized activity. If policymakers decide that marijuana enforcement efforts should be directed overwhelmingly at major sources of supply, the existence of a loophole for small-scale retailers becomes a matter of little concern.[28]

Those who perceive the creation of a loophole as a serious problem will want to limit the scope of decriminalization to small amounts, nonprofit transactions, or gifts only. Making this policy choice does not, however, mean that all "commercial" marijuana offenses must be treated the same. Depending on the relative importance attached to proportionality as a limiting principle in the application of criminal sanctions to commercial activity, policymakers may decide to subdivide the criminal offense of sale into categories that reflect the relative seriousness of the offense. Thus, it is possible to have legislation that classifies as a misdemeanor those transfers that are too serious to qualify for decriminalization but not serious enough to merit felony treatment.

Cultivation for Personal Use

The overwhelming majority of marijuana consumed in the United States has been imported from Mexico, the Caribbean, or Central and South America. Although visitors to these countries may smuggle small amounts for their own use, most illicit importation is commercial in nature and involves substantial amounts.

Although domestic cultivation of marijuana has never been a serious problem (because its THC content is relatively low), the plant is easily cultivated and can even be grown indoors. Because it is a relatively simple matter to prepare marijuana for use, small-scale cultivation of the weed is a relatively widespread practice in the United States.

Under current penalty schemes, cultivation of any amount is punishable in most statutes as a serious felony with penalties usually as severe as those for sale. It seems clear that legislators interested in rationalizing their marijuana penalty statute could, at a minimum, revise and "grade" cultivation penalties to distinguish between commercial and noncommercial activity. Assuming that cultivation of small amounts for personal use should be subjected to lesser sanctions than commercial cultivation, the familiar problem remains of setting the amount limitation. This problem is addressed below after discussion about whether the reduced sanction for cultivation for personal use should be a "criminal" one or encompassed within the class of decriminalized behavior.

A legislator interested in conserving criminal justice resources while maximizing the deterrent value of the law probably would not be interested in decriminalizing cultivation. Not many arrests are made for this activity, and any increase in arrests after decriminalization of possession would be slight. However, a legislator who wants "disproportionate" criminal penalties removed from private, consumption-related behavior, would presumably decide to decriminalize cultivation for personal use because it falls within the rationale for decriminalization. It could be argued that since cultivation of small amounts of marijuana is not a serious threat to society, enforcement of criminal sanctions against the few who are detected may appear unnecessarily harsh and unfair. It could further be argued that discreet cultivation of marijuana on one's own property for home consumption is within the ambit of behavior that could be immunized from what many believe are intrusions by law enforcement authorities into the privacy of the home.

It might be argued, however, that decriminalization of home cultivation would increase the availability of marijuana and result in an increased frequency of consumption. Under this view, there is a difference in kind (not only in degree) between decriminalization of possessory conduct and decriminalization of cultivation. Decriminalization of possessory conduct makes it possible for marijuana users to keep a limited supply on hand without risking serious penalties. Decriminalization of cultivation, however, will increase the number of users who maintain a potentially unlimited source of supply. If cultivation for personal use were decriminalized, it would be theoretically possible for every user to grow and consume, in relative safety, as much marijuana as he pleased. Even the risk of incurring a fine or having the plants confiscated would not be very great if the cultivation was carried out on private property out of public view.[29]

One answer to this contention may be that the ultimate social goal of marijuana prohibition (reducing the adverse social consequences of marijuana use) is better served by a sanctioning system which encourages home consumption by users than in one which deters it. Most homegrown marijuana is less potent than imported contraband and its use would presumably diminish any adverse health consequences that might occur as a result of use. In addition, since users who grow their own marijuana would not be supporting the commercial market, decriminalizing personal cultivation might reduce the aggregate demand for smuggled contraband and thereby increase the price and reduce the demand still further. Finally, users who choose to "grow their own" are no longer in constant contact with dealers who may offer them other illicit items for sale.

However this issue (decriminalization) is resolved, legislators could attempt to grade the penalties for cultivation, reducing the penalty for private cultivation of small amounts to a misdemeanor.

Whether decriminalized or reduced to a misdemeanor, the question arises how this "small amount" line should be drawn. Since much of the marijuana plant cannot be consumed, it may be advisable to designate a number of plants, rather than weight, as the unit of measure that will yield approximately the amount of usable marijuana which is the basis for decriminalization of possession. Alternatively, policymakers may want to set a smaller number to reflect the importance they attach to discouragement of cultivation, or a larger number to reflect the fact that a single batch of plants is often intended to yield a year's supply of marijuana.

SELECTING SANCTIONS FOR MARIJUANA USERS: "NONCRIMINAL" SANCTIONS IN CONTEXT

For purposes of the following analysis, it is assumed that the decisionmaker, whether it be the Governor or the legislature, has already concluded that possession of marijuana for personal use and other consumption-related activity (however defined) should not be punishable by incarceration. In other words, it will be assumed that the decisionmaker has concluded that the possible deterrent value of a threat of incarceration is outweighed by the individual injustices and the procedural inefficiencies that are introduced into the system by authorizing imprisonment for the "least serious" marijuana behavior. In addition, the legislator may also have concluded that incarceration, as a sanction, is disproportionate to the offense in terms of its relative seriousness. Within this framework, many additional issues must be resolved in terms of both the post-conviction consequences of conviction for the least serious marijuana-related activity, and the post-arrest consequences of being detected and apprehended for such an offense, both of which are addressed in later parts of this section. First, however, it is useful to place the sanctioning choices now being made for marijuana use against the backdrop of two generic reform trends in the criminal law.

"Overcriminalization" and Law Reform

For some years now, criminal law reformers and commentators have called attention to the adverse institutional effects of "overcriminalization," recommending that many disapproved behaviors (such as consensual sexual behavior, public drunkenness, marijuana use, gambling, and abortion) be removed from the sphere of the criminal law. The "limits" of the criminal sanction are numerous. First, a diminished respect for the law is occasioned by society's retaining the criminal sanction for these activities in name but not enforcing them. That is, the behavior is condemned in words (the law) but not in deeds (prosecutions). As Professor Kadish asserts in a 1967 article in Annals: "Moral adjurations vulnerable to a charge of hypocrisy are self-defeating no less in law than elsewhere."[30]

Second, criminalization of less serious behavior may actually breed crime rather than reduce it. Recent studies leave little doubt that imprisonment sometimes aggravates an individual's propensities toward crime.[31] Thus, in the case of the perpetrators of "less serious" actions, it may well be that imprisonment itself generates future "more serious" offenses. For this reason, several major authorities (including the National Advisory Commission on Criminal Justice Standards and Goals and the American Bar Association Standards) have recommended that probation be the standard penalty, with incarceration reserved for cases in which special reasons for imposing it exist.[32] With respect to marijuana, the very illegality of the drug itself--without regard to incarceration--may lead to "more serious" behavior. That is, since the drug is illegal, users must secure it in an illicit marketplace, which heightens the risk that marijuana users will be exposed to the "harder" drugs which are also available in the marketplace.[33]

Third, marijuana use, like other private, consensual conduct, is difficult to detect (and, thus, to deter) within the boundaries of constitutional norms governing police behavior. Because there is no injured party to bring violations to the attention of the police, the police are forced to resort to apprehension strategies--such as entrapment, the use of informants, or illegal searches and seizures which may later be the subject of perjured police testimony in court--which demean not only the officers personally but also the process of law enforcement itself.[34] This unenforceability in turn gives rise to opportunities for corruption of and selective enforcement by police, both of which are institutionally damaging to the process of law enforcement.

Finally, there is the tremendous cost of enforcing prohibitions against "consensual" crimes. Efforts to release public resources from the duty of enforcing these laws should not be discounted, particularly in light of the steadily increasing volume of violent crime and the ever-diminishing capacity of the law enforcement agencies to deal with it. Recognizing that the efforts to enforce the laws against prostitution, gambling, and drug use have not significantly reduced the availability of those vices, and weighing this against the tremendous cost and adverse institutional effects of that effort, Professor Kadish concludes: "It seems fair to say that in few areas of the criminal law have we paid so much for so little."[35] In response to these considerations several states have recently decriminalized homosexuality, fornication, and other consensual sexual offenses, and major steps have been taken in most states to decriminalize public drunkenness. In particular, most states have adopted the provisions of the Uniform Alcohol Intoxication and Treatment Act that substitutes noncriminal bases for intervention in cases involving alcoholics and persons incapacitated by alcohol use.

The trend toward decriminalization of marijuana use and consumption-related behavior must be seen against the backdrop of these generic efforts to redefine the scope of the criminal law. In 1972, when the National Commission on Marihuana and Drug Abuse recommended that the criminal sanction be withdrawn from possession and other consumption-related behavior, the commission placed its recommendation in the context of these broader trends of criminal law reform. Similarly, the American Bar Association, the National Conference of Commissioners on Uniform State Laws, the National Advisory Commission on Criminal Justice Standards and Goals, and other expert bodies concerned with the administration of criminal justice, have viewed marijuana decriminalization as merely one aspect of the "overcriminalization" problem.

The Search for "Noncriminal" Sanctions

A related trend in criminal law reform pertains to the search for noncriminal sanctions for behavior which is disapproved but is not thought to be serious enough to warrant punishment by incarceration and stigmatization implicit in criminal sanction. For several decades, drafters of criminal codes and interested commentators and legislators have acknowledged that the criminal sanction may be too potent, too stigmatizing, and too cumbersome from a procedural standpoint for much disapproved behavior. Particular emphasis has been placed on regulatory offenses and other kinds of conduct which, though disapproved and discouraged, are not regarded as morally offensive. For example, the National Advisory Commission on Criminal Justice Standards and Goals, whose mandate was to formulate national standards for crime reduction and prevention at the state and local level, suggested removal of certain offenses from the criminal justice system when the harms governed by them might be more properly controlled by civil regulatory bodies. Included in this category are minor traffic violations, violations of building codes, zoning ordinances, health and safety regulations, and evasion of state taxes. The Advisory Commission also suggested removing drug offenses from state criminal codes, if diversion options were feasible.[36]

In 1962, the drafters of the Model Penal Code proposed that legislatures create a "civil violation," punishable solely by a fine whose maximum amount is $500, and resulting in none of the adverse legal consequences which are attendant upon conviction of a criminal offense. Several states (e.g., Oregon, Connecticut, and Minnesota) have adopted the Model Penal Code civil violation concept, extending it to offenses such as marijuana possession, employment of minors in places of entertainment, driver training school regulations, and traffic offenses. Several other states have created a lesser offense which is not punishable by incarceration and which is not called a crime, even though nothing specific is said about the legal consequences of "conviction": Delaware (violation), Kentucky (violation), Illinois (petty offense), and Utah (infraction). Finally, it is noteworthy that New York classifies some offenses as "violations," which are not crimes but are nonetheless punishable by up to 15 days in prison. (It may be that the major purpose of this "decriminalized sanction" is not being achieved, since a violation is punishable by a jail term.) Vehicle offenses and violations of construction regulations are examples of behavior punishable as violations rather than as crimes in New York.

In addition, juvenile offenses and proceedings for civil commitment have for many years been handled in a manner that departs significantly from the standard criminal pattern. Thus juvenile offenders are "delinquent" rather than "criminals," the records of their misdeeds are sealed, and procedures are more informal and primarily geared toward rehabilitation. Once again, the theory behind the difference is a recognition that the blunt instruments of the criminal justice system are both inappropriate and unfair in attempting to deal with certain kinds of behavior.

There is a pragmatic reason--quite apart from notions of fairness--why such problems should not be dealt with in the criminal mode. Herbert Packer argues that much of the criminal law's deterrent value derives from its stigmatic effects, and the imposition of the criminal label in contexts, such as regulatory offenses, which are viewed by large segments of the population as nonculpable dilutes that stigma: "The ends of the criminal sanction are disserved if the notion becomes widespread that being convicted of a crime is no worse than coming down with a bad cold."[37] In the same manner, the drafters of the Model Penal Code felt that the violation concept ". . . will serve the legitimate needs of enforcement, without diluting the concept of crime or authorizing the abusive use of sanctions of imprisonment."[38]

Again, the recent legislative movements in several states to substitute civil sanctions for criminal ones in connection with possession of marijuana for personal use and other consumption-related activity should be viewed against the backdrop of this generic effort to utilize noncriminal sanctions. Indeed, several (four of 13) members of the Marihuana Commission who concluded that they were unwilling to withdraw all sanctions from marijuana-related activity, were nonetheless unwilling to continue to utilize the criminal sanction. They specifically recommended that marijuana possession and other consumption-related activity be punishable by a civil fine.

An Overview of "Less Criminal" Sanctions

Alternative sanctioning devices, which may be used in connection with marijuana-related activity, are analyzed later in this chapter. Unfortunately, as is indicated by the summary of current state laws in Volume 3, the traditional distinction between civil and criminal sanctions is inadequate from both a descriptive and a prescriptive standpoint. Once legislators or other decisionmakers have concluded that a particular behavior is not as deserving as more serious behavior of criminal stigma and imprisonment, the sanctioning consequences of violating the law may be ameliorated without changing the statutory label. Thus, a criminal offense may be punishable by a fine only.[30] Also, even if the offense is punishable by imprisonment, use of systematic diversion programs may undermine the original classification as a crime. Finally, specific provisions may be made to minimize the likelihood of deprivation of liberty after arrest (through citation programs), and the consequences of conviction may be ameliorated through specific provisions permitting record expungement and a statement of "no record" on job applications.

The ambiguity runs in the other direction also. Thus, even when an offense is classified as a civil violation for purposes of record consequences, the legislature might provide that the offense is still punishable by a period of confinement. For example, the Senate Judiciary Committee's 1976 bill revising the federal criminal law created a category of civil infractions (noncriminal) but authorized the judge to sentence a violator to up to 15 days in jail. The New York provisions described earlier have the same effect.

As should be apparent, there is currently no "bright line" between criminal and civil sanctions; instead, legislators have at their disposal a continuum of sanctions which are more or less severe and more or less "criminal" along a number of different dimensions. To facilitate the analysis in the following pages, we will approach the matter functionally. In this connection, it is useful to recognize that involvement in the sanctioning process begins after apprehension for the offense, and that some sanctions take effect even before an adjudication:

- post-arrest consequences:
    - injury to reputation (record consequences of arrest);
    - deprivation of physical liberty (custody); and
    - deprivation of property/inconvenience (associated with appearance in court and defending oneself).
- post-conviction consequences:
    - deprivation of physical liberty (jail or lesser deprivation);

- deprivation of property (fine); and
- injury to reputation (record consequences of conviction).

It is important also to recognize that the choice of a particular sanctioning device carries procedural implications from a constitutional standpoint, and that these implications do not necessarily parallel the use of criminal or civil labels. For example, the possibility that a jail term may be imposed, even for a day, means that indigent defendants must be provided counsel; on the other hand, no jury trial is required unless the defendant can be sentenced to more than 6 months in jail. The confusion is reflected in the fact that it is not clear whether and under what circumstances the standard of proof must be "beyond a reasonable doubt" (the criminal standard) as compared with "clear and convincing" evidence or a "preponderance of the evidence" (the more or less civil standards).

MODIFYING THE CRIMINAL SANCTION: POST-CONVICTION CONSEQUENCES

Assuming that imprisonment is regarded as an unjust and/or inefficient sanction for consumption-related conduct, several remaining questions must be resolved regarding the legal consequences of the occurrence of such conduct.

- Should the conduct be punishable by any type of legal sanctions? If so, what type of sanction is appropriate?
- In addition to whatever deprivation of property is assessed, should a violation also be punishable by the imposition of a criminal record? If so, to what extent should the ordinary consequences of such a record be ameliorated?
- If the sanction is a fine, how much should it be and what should be the consequences of nonpayment?
- Should the sanction be increased for subsequent offenses by the same offender?
- Assuming that least serious consumption-related behavior by adults is punishable by a fine, must any special provisions be made for minors?

The Necessity of Legal Sanctions

Two of the traditional purposes of penal provisions--incapacitation of dangerous offenders and punishment of intrinsically immoral behavior--are wholly inapplicable to these marijuana offenses. Instead the possible utility of a sanction for this conduct lies in its implementation of a policy aiming to discourage marijuana consumption. In theory, legal coercion (less severe than the threat of imprisonment) can do this by:

- deterring the prohibited behavior;
- symbolizing social disapproval of the behavior and thereby reinforcing attitudes unfavorable to consumption; and
- providing legal leverage to channel detected users into specific programs designed to discourage consumption.

As a practical matter, the incremental deterrent effect of a fine is probably not substantial. For the most part, individual decisions to experiment with marijuana have not been influenced in recent years by the fear of legal sanctions. Instead, the prohibitions against distribution force the traffic underground and thereby circumscribe the population with an opportunity to experiment. In addition, these prohibitions, which establish the conditions of availability, have a much more significant impact on containing the population of continuing users (at less than 50 percent of the experimenters) than does the threat of sanctions for possession. A fine applied with certainty would depress the rate of increased experimentation among previously uninitiated populations. Although there are no data measuring the increased rate of experimentation when sanctions are removed, the data in states which have enacted fines are consistent with this analysis. The opportunity to consume occurs mainly in private. At best the continuing sanctions against possession will serve to discourage committed users from transporting their marijuana on their person or in their vehicles when they venture into public.

While the "leverage" value of legal sanctions may be significant in connection with alcoholism and heroin addiction, it would appear minimal where marijuana is concerned. The overwhelming majority of persons who experiment with marijuana and use it recreationally are not in need of "treatment." They are indistinguishable from their nonmarijuana-using peers by any criterion other than their marijuana use. Instead, the main value of leverage is "educational" and preventive rather than therapeutic. But the question arises whether the costs of enforcing such a sanction and maintaining an educational program (like driver education classes) are worth the likely payoff. If the point is to counsel against the use of more harmful substances, this seems a more costly and unnecessarily coercive method of doing so; indeed, it seems unwise to pervert the criminal justice system to serve functions that ought to be performed by the public school system.

This is not to say that children and adolescents apprehended for marijuana possession should not be channelled into appropriate counselling and/or educational programs. Indeed, this "leverage" approach is a distinguishing feature of the juvenile justice system and should be employed in individual cases as indicated. But "leverage" is an inadequate justification, in itself, for imposing legal sanctions on consumption-related activity by all marijuana offenders, including responsible adults.

The most convincing argument for some legal sanction for consumption-related behavior lies in its presumed symbolic effect. By this is meant the generalized "educative" or "moralizing" influence generated by a formal expression of social disapproval. The thought is not so much that the threat of being sanctioned "deters" but rather that the formal prohibition ("it's against the law") will reinforce other environmental forces that shape the desired attitudes toward consumption of psychoactive drugs in general and marijuana use in particular. Again, from a purely empirical standpoint, the question is whether the penalty for consumption itself significantly augments the message conveyed by the total prohibition against cultivation, importation, and distribution. Society's attitudes, as indicated through its laws, would appear to be well-stated. It is noteworthy in this regard that during alcohol prohibition, all but five states saw no need to extend penal sanctions to possession of illicit liquor for personal use. On the other hand, some observers contend that the absence of a sanction makes it legal and therefore connotes approval despite the continuing enforcement of prohibitions against availability.

In any event, the question is whether the incremental deterrent and symbolic effects of the legal sanction (at a minimum a fine) is depressing the number of users and the frequency of their use warrants the administrative costs necessary to enforce the law and apply the sanction and the invasions of personal privacy thereby engendered. Accounts of legislative processes in states that have enacted (and defeated) decriminalization proposals suggest that the major contending considerations are, indeed, perceived symbolic importance of maintaining a "penalty" (and, in some cases, calling it a crime for purely symbolic reasons) for marijuana possession on the one hand, and concerns about violations of personal privacy on the other.

As far as pure cost factors are concerned, the administrative expenses of enforcement and processing of the fine will probably exceed substantially the amount of money collected in most jurisdictions. Two qualifications should be entered, however. First, the costs of criminal justice processing can be reduced substantially by foregoing all customary incidents of the criminal process (i.e., booking, custody, and personal appearance in court). Second, a large number of detected and sanctioned violations can produce a sizeable payoff in fines (e.g., the California experience). For the most part, however, the administrative cost is not a determinative factor, especially since it can be reduced substantially through appropriate procedural reforms.

In sum, these observations suggest that a policymaker interested in the benefits of decriminalization and who believes that some legal penalty for marijuana consumption is a necessary feature of discouragement policy, may prefer to select a fine, not a leverage sanction, and to facilitate its efficient and least "intrusive" administration. On the other hand, a policymaker who believes that the incremental symbolic and deterrent benefits of a consumption penalty do not significantly exceed the preventive effects of continuing prohibitions against distribution (or who believes that any penalty for possession is disproportionate to the harm engendered by the conduct), should withdraw all legal sanctions from least serious consumption-related behavior. (For a more detailed discussion of state responses, see Volume 3, Chapter V.)

For purposes of the remainder of this chapter, it will be assumed that the policymaker has decided to retain least serious marijuana-related behavior as a prohibited offense, punishable by a fine. The first question then is whether, and in what way, commission of such an offense involves the criminal process.

The Record Consequences of Arrest and Conviction

A criminal arrest, even if no conviction follows, will normally be a traumatic experience, particular for the first offender. Even if the defendant is ultimately released without charge or is acquitted, he will suffer the inconvenience and embarrassment of being brought to the police station and booked, photographed, and fingerprinted. This deprivation of liberty could last a significant length of time, especially if bail is required and the defendant is unable to post it immediately. He also may miss work while being detained and even if he loses no working time, his employer may dismiss him upon learning of the arrest.

The existence of an arrest record can also work to the detriment of the arrestee in subsequent encounters with the criminal justice system. At any level of the criminal justice system, an arrestee with a prior arrest record is likely to be prejudiced by that fact: he is less likely to receive leniency from the prosecutor than a person without a record in terms of dropping or reducing charges; likewise the defendant with a record may receive a harsher sentence than a similarly situated first offender.

The mere existence of an arrest record may also injure the arrestee in the marketplace. His most serious problem will be an inability to truthfully respond "no" to the question "Have you ever been arrested or convicted of a crime?" It is the rare employment application that does not contain this question, and perhaps rarer still is the employer who will look favorably upon the applicant whose response is "yes."

If the arrestee is subsequently convicted of a criminal offense, all of these record consequences are, of course, exacerbated. A host of legal disabilities flows from criminal convictions, even of a misdemeanor. The records may be accessible to both public and private employers. The convicted misdemeanant may be precluded by licensing laws from engaging in certain occupations and from securing public employment. A convicted felon in virtually all states is ineligible for occupational licenses and public employment and is usually disenfranchised as well.

A number of state legislatures have enacted generic provisions for reducing these consequences of criminal arrest and conviction records. The goal here is to analyze some of the alternative avenues for ameliorating the record consequences of arrest and conviction as part of a reduction or elimination of criminal penalties for consumption-related marijuana behavior. As in previous discussions of other drafting issues, this analysis may differ according to the rationale for adopting a change in the sanctions applied to the use of marijuana.

Minimal Sanction

First, the legislature may determine in essence that the punishment does not fit the crime; that is, that smoking or possessing a marijuana cigarette for one's own use simply is not a sufficiently serious offense to warrant the imposition of all the legal, economic, and social disabilities ordinarily implied by the criminal sanction. Apart from this elementary notion of proportionality, a related rationale may be the unfairness to the individual and the counterproductive social effect of stigmatizing marijuana offenders with criminal labels. In either context, a legislator may well believe that any type of criminal stigma associated with marijuana use engenders a disrespect for the criminal justice system as a whole.

Criminal Recordkeeping Cost

Second, even if the offense is considered important enough for some serious (even stigmatic) sanction, the incremental deterrent value of retaining the sanctions associated with criminal records may not be justified by the administrative cost. A legislature might easily determine, for example, that the police resources now employed in booking, recording, and maintaining the records of marijuana offenders could be better expended in the enforcement of more serious crimes, especially violent crime. Similarly, legislators might well find that the procedural system necessary to process criminal offenses is too costly, and may be willing to sacrifice the stigmatic aspects of the sanction to facilitate expeditious and convenient processing of offenders. Although any reform adopted will most likely be motivated by a combination of these factors, the precise content of the remedial measures may be adjusted according to which of these policies was the predominant factor behind the reform.

Potential Civil Violation

If the dominant motivating force behind the reform is the perception that the criminal stigma is unfair and disproportionate to the offense, the best legislative course may be to remove the stigma entirely by labelling the offense a civil infraction or by using some similar noncriminal appellation. No record consequences would flow from apprehension and adjudication at all. Any records (of citations, etc.) maintained for research or other administrative purposes could be designated as civil and segregated from criminal records. Access should be restricted to serve only those limited administrative purposes that may include searches for prior citations, if the legislature provides for increased penalties for subsequent offenses.

Potential Reforms

In the event that the reform is designed primarily to accommodate the presumed deterrent and symbolic value of the criminal penalty with the need to reduce the cost of administering it, several devices are available. First, clear benefits can be obtained by eliminating formal booking procedures, thus saving police the time and arrestees the inconvenience associated with fingerprinting and photographing minor marijuana offenders. Persons apprehended could simply be issued citations to appear in court. Beyond this, two basic approaches are available to adjust the severity of the penalty to the less serious nature of the offense, involving various degrees of destigmatization: (1) expunging or sealing records immediately after conviction, or (2) expunging or sealing the records after expiration of a stipulated period of time. Either of the options could be supplemented with the right to state the nonexistence of arrest or conviction for a criminal offense.

The choice among immediate or postponed expungement or sealing depends upon how the legislature accommodates the presumed deterrent effect of the criminal penalty with the unfairness of stigmatizing minor marijuana offenders in the economic sector. If the legislature is seriously concerned about the economic disutility of criminalization, a crucial feature of the reform would be to permit the offender to state "no record" in connection with pre-employment inquiries. To be effective, the remedy should take effect immediately after arrest.

The central consideration in choosing between expunging and sealing is whether future access to the records is considered necessary for certain limited purposes. For example, if penalties are to be increased for subsequent offenses by the same offender, immediate expungement could not be employed. Another potential reason for record retention is for research purposes. However, if a sealing provision is enacted; measures could be taken to prevent unauthorized dissemination. This could be accomplished by segregating sealed files from others and restricting access to them. If the only purpose of choosing sealing is to facilitate research, then the information identifying the offenders could be removed from the files and then left with the general files.

If, as is very likely, the decision to ameliorate the record consequences of arrest and conviction for consumption-related marijuana offenses is motivated by considerations of unfairness as well as cost, full decriminalization is the most effective remedy. It eliminates unfairness to the offender by never attaching the criminal stigma with its concomitant legal, social, and economic disabilities. It also eradicates the administrative cost completely by eliminating the need for recordkeeping and removing the incentives for violators to contest their guilt. Even immediate expungement or sealing would put the police through unnecessary record production exercises. On the other hand, the symbolic importance of retaining the criminal label has been apparent in the legislative processes of several reform jurisdictions (e.g., California, Ohio, and Colorado), each of which continues to classify minor marijuana offenses as crimes, while they have attenuated or eliminated the stigmatic incidents of the criminal sanction.

The Imposition of "Noncriminal" or "Less Criminal" Sanctions

Whether the sanctioning process has criminal overtones, several operational questions are raised regarding the administration of sanctions other than incarceration: the amount of any fine, the consequences of nonpayment, and the structure of any educational program.

Amount of Fine

If a fine is chosen as the sanction for least serious consumption-related behavior, the next question is "how much should it be?" There are a number of reasons for limiting the maximum fine to an amount comparable to the penalty for a serious traffic offense (e.g., no more than $100). First, there is no evidence that the deterrent effect will differ according to the amount of the fine once it reaches a certain non-nuisance level (e.g., $25). Second, the symbolic effects are retained by any fine, no matter what its amount--again so long as it is not *de minimis*. Third, the practical and legal difficulties associated with administering the sanction are mitigated if the amount of the fine is held to a minimum.

Consequences of Nonpayment

Several important issues must be considered in connection with the administration of a financial penalty for marijuana offenses. The most efficient way to collect, of course, is to insist upon payment immediately after apprehension and conviction. However, decisions of the United States Supreme Court have placed limits on the use of incarceration as a means of insuring immediate payment. It is no longer constitutional to imprison a defendant who is financially unable to pay his fine.[40]

Thus, any procedure for enforcement of payment against defendants who *are* able to pay must begin with a hearing for the purpose of determining ability to pay. Although the Supreme Court has not spelled out the procedural requirements of such a hearing, it seems likely that they include the right to counsel and the right to present witnesses in defense of a claim of indigency.[41] Moreover, at least as a matter of policy, it has been held that, prior to the indigency hearing, the defendant cannot be confined at all.[42]

If a defendant is able to make immediate payment and refuses to do so, or if after he is given a "reasonable opportunity" to pay the fine "consistent with his financial situation" and fails to take advantage of this opportunity, he can be incarcerated for a period of time whose constitutional limits are not yet settled.[43] However, a defendant who is unable to pay the fine must be allowed a period of time that affords him a realistic opportunity, under the circumstances of his case, to make payment through installments or otherwise.

In the hypothetical case of the defendant who, through no fault of his own, is unable to make payments under a plan that gave him a "reasonable opportunity" to do so, courts have offered differing speculations. One court has suggested that imprisonment solely on grounds of inability to pay would deprive the poor of equal protection of the law.[44] On the other hand, another court has suggested that discharge of an indigent defendant, while better-off defendants are forced to pay a penalty, would deprive the affluent defendant of equal protection.[45] This difficult case is likely to be rare if courts make use of their discretionary powers to reduce fines and postpone payments in cases where defendants are truly without means.

An additional alternative means of collecting fines from indigent defendants is to require them to report for work on some public project for the number of days necessary to satisfy the fine. Although this approach may also involve constitutional problems to the extent that the work is perceived as "custody," if it is presented as an alternative to installment payments it may simplify collection from defendants who are tempted to use indigency as an excuse for future nonpayment.

The best method of dealing with the problem of indigency may be to permit judges to offer any person who pleads inability to pay the option of attending an appropriate education program or performing some public service involving an equivalent sacrifice of time. This "optional" approach can also be employed in cases involving offenders whose drug involvement is significant enough to suggest that participation in some "education" program would be beneficial. If such programs have any educative effect at all, that effect is likely to be greater to the extent that the defendant's participation is voluntary. If defendants are given a realistic choice, i.e., the option to pay a fine or attend the program, those who enter the program will be attending, at least in part, of their own volition and will be that much more likely to benefit.

Structure of Educational Program

If the preferred sanction is an education program, it could resemble (in time and in convenience) the driver education programs required for youthful violators or multiple adult offenders. It is clear from all we have learned about drug education programs that the objective cannot be to "teach" the evils of marijuana use. Instead, the objective must be to instill responsible and mature attitudes toward the use of psychoactive substances, including both marijuana and alcohol.

It was suggested earlier that it may be legislative overkill to make a leverage sanction (in lieu of a fine) mandatory in all cases involving the least serious consumption-related behavior. On the other hand, it should be emphasized that an education program may be a useful optional sanction for persons unable to pay the fine and may also be an appropriate dispositional alternative for some (though not all) repeat offenders or youthful offenders. In each of these latter situations, however, policymakers must address generic questions regarding the desirability of different (and more burdensome) sanctions for subsequent offenses and for minors, each of which will be discussed below.

Subsequent Offense Penalties

Assuming a state has decided to decriminalize some marijuana behavior and to impose a civil fine for these least serious offenses, the question arises whether the sanction applied should vary according to the number of such offenses committed by the same offender. There are three alternatives: (1) retain the same penalty for subsequent offenses as for first offenses, (2) impose a larger fine for subsequent offenses, or (3) apply more severe criminal sanctions for subsequent conduct in the form of either stigma or incarceration.

Once again the number of rational choices is circumscribed by the rationale that underlies the initial decision to reform the marijuana prohibitions. If the legislature's concern is to minimize the involvement of marijuana users in the criminal system because of concerns about fairness of enforcement and about the disproportionality of criminal sanctions (incarceration and stigma) to the offense, then it makes no sense to increase the penalty for second offenders. That is, the same notions of fairness apply whether it is the first or the second time an individual is apprehended for a marijuana violation.

On the other hand, if the legislators' primary goal is simply to decrease the cost of enforcing marijuana prohibitions and at the same time to retain measures to deter as much marijuana behavior as is possible consistent with the goal of cost reduction, then increasing penalties for subsequent offenses may be a rational course. Nonetheless, it is quite clear that to increase penalties at all for subsequent offenses will deviate from the cost-reduction principle to a significant degree in that records of the initial violations will have to be maintained to determine whether a violator is a second offender.

In the event that policymakers opt for stricter penalties for subsequent offenses, the two goals of fairness and cost reduction may be better served if a larger civil fine is imposed in lieu of criminal sanctions.

If the legislature has decided that a first offender should receive only a civil fine, some might then argue that it is unfair, especially in light of the high degree of selectivity and arbitrariness prevalent in marijuana law enforcement, to bring into force the full panoply of criminal sanctions (the embarrassment of arrest and booking and the economic and social consequences of having a record and especially incarceration) merely because a casual marijuana user has been caught a second time.

It is also clear that authorizing imprisonment for subsequent offenses will exact the greatest toll in terms of cost of enforcement. Aside from the obvious expense of incarceration itself, one principal advantage of the fine-only scheme--the elimination of costly trials--will be lost if incarceration is authorized. Defendants will be less likely to plead guilty if they face possible confinement than if the only penalty is a fine. The threat of imprisonment may also engender more technical search and seizure claims both at trial and on appeal, all of which will operate to drain judicial resources which are generally scarce already.

Even a criminal sanction that excludes imprisonment as a penalty will add significantly to the cost of deterring marijuana behavior. More formal procedures will have to be utilized during arrest in that the offender must be brought to the station, fingerprinted, and photographed; criminal records will have to be maintained; some defendants may be inclined to contest the charge either to avoid the higher fine or the criminal stigma; and notions of due process may require that publicly paid counsel be offered to indigent offenders.[46]

In the final analysis, even if the goal of reform is to deter as much marijuana behavior as possible without regard to fairness, policymakers must decide whether an uncertain incremental degree of deterrence is worth its cost. Of the states that have decriminalized marijuana, seven decided it was not worth the price and provided no additional sanctions for subsequent offenses.[47] Only Minnesota increased the penalty for a subsequent violation. In that state the first time one is convicted of possession of up to 1-1/2 ounces the maximum penalty is a $100 civil fine, while subsequent offenses are subject to a criminal fine of up to $300 and a jail term not to exceed 90 days.

Apart from fairness and relative deterrence and cost, one additional consideration here is the possible utility of the sanctioning system as a leverage device in cases involving recidivists. It is possible that repeated apprehension for marijuana offenses may indicate, in some cases, that the individual has progressed beyond purely recreational use of marijuana to more intensified patterns of psychoactive drug use. Again, a judicious use of discretion to utilize optional educational or counselling programs may be a more effective way of dealing with this problem than the enactment of categorical increases in sanctions for subsequent offenses.

Applicability to Minors

One question that has been raised with respect to proposals for decriminalizing the possession and sale of small amounts of marijuana is whether the reforms should recognize a distinction according to whether the same offense is committed by a juvenile or by an adult. Some legislators may wish to permit greater intervention in the case of a juvenile. That is, the same legislator who finds no objection to permitting the penalty for possession for personal use to be reduced to a mailed-in fine when the offender is an adult, may wish to grant the juvenile court jurisdiction where the offender is a juvenile. The issue is whether decriminalizing possession of marijuana for personal use will require a change in the definition of juvenile delinquency to allow possession of marijuana to remain an allegation sufficient to support a juvenile delinquency petition.[48]

In general a juvenile court has jurisdiction in four situations: (1) where the juvenile has committed an act that would be a crime if done by an adult, (2) where the child is beyond the control of his parents or is engaging in conduct which, though not criminal, is thought to be deleterious to himself, (3) where the youth's parents, though able to offer proper care and guidance, fail to do so, and (4) where the child's parents are unable to care for him.[49] Possession of marijuana will clearly not justify juvenile court intervention under numbers (3) and (4). Possession of marijuana may give the juvenile court jurisdiction under numbers (1) and (2), depending upon the type of marijuana law reform enacted, as well as upon the wording of the statutory definition of juvenile delinquency.

Some states, in reducing the criminal penalties for possession and sale of small amounts of marijuana, still label such acts criminal.[50] In those states, no change in the definition of juvenile delinquency will be needed to achieve the goal of greater intervention in the case of juveniles, since the commission of an act that would be criminal if committed by an adult is already sufficient to give the juvenile court jurisdiction.

Even if a legislature were to completely remove the criminal stigma from possession and sale of marijuana for personal use, such activity by a juvenile could provide the basis of a juvenile delinquency petition on the theory that the youth is engaged in activity which may be harmful to himself. For example, in New Jersey the statutory definition of juvenile delinquency consists of a series of acts and includes "(d) Deportment endangering the morals, health or general welfare of said child."[51] A court could easily find that possession of even small amounts of marijuana comes within the broad scope of this provision.

Almost every state has a statute which vests the juvenile court with jurisdiction to entertain a petition alleging noncriminal conduct by a child injurious to his "health, welfare or morals." Different states have different labels for this jurisdiction--persons in need of supervision (New York), ungovernability (Virginia), children in need of supervision (Maryland). Some states provide by statute that such children may not be incarcerated. However, in most states today a child found within this jurisdiction can be the subject of any of the three generic juvenile dispositions--incarceration, probation, or unconditional release. Whether occasional marijuana use would fall within this jurisdiction is uncertain; for example, some cases have held that occasional use of alcohol or tobacco does not. However, a court could easily find that possession of even small amounts of marijuana comes within the broad scope of this jurisdiction, and it is almost certain that chronic marijuana use would fall within this jurisdiction.

On the other hand, if the statutory definition of juvenile delinquency is more narrowly drawn and the criminal label is removed from possession of small amounts of marijuana, it is difficult to see how a court could find possession to constitute a sufficient allegation to issue a juvenile delinquency petition. For example, the California provisions on the jurisdiction of the juvenile court leave no room for intervention unless possession of marijuana for personal use is a crime:

> § 602. Minors violating laws defining crime; minors failing to obey court order
>
> Any person who is under the age of 18 years when he violates any law of this state or of the United States or any ordinance of any city or county of this state defining crime or who, after having been found by the juvenile court to be a person described by Section 601, fails to obey any lawful order of the juvenile court, is within the jurisdiction of the juvenile court, which may adjudge such person to be a ward of the court.[52]

In a state with such a narrowly drawn definition of juvenile delinquency, the legislator who wishes the juvenile court to retain jurisdiction over youths who possess small amounts of marijuana after such an offense has been classified as a civil infraction must pursue one of two courses: (1) amend the juvenile delinquency definition to include possession and sale of even small amounts of marijuana, or (2) add to the marijuana decriminalization bill a provision that possession of marijuana for personal use by a juvenile permits the juvenile court to exercise jurisdiction. Indeed, even in a state like New Jersey where the statutory definition of juvenile delinquency is broad enough to encompass noncriminal possessory activity, it would be wise for the legislature to make manifest its intention to permit juvenile court jurisdiction over such activity. This would foreclose any possibility that a court may refuse to find noncriminal possession to constitute an allegation sufficient for issuance of a juvenile delinquency petition.[53]

Furthermore, the legislature, if it decides that greater intervention in the case of juveniles is desirable, may wish to specify precisely what kind of disposition is permissible. For example, it is doubtful that a legislature which adopts a fine-only policy for adults would intend to permit confinement in a reformatory for a juvenile engaging in the very same activity. However, the legislature may decide that appearance in juvenile court should be mandatory or that attendance at a drug education course is the appropriate disposition. Additionally the legislature, while not authorizing confinement for noncriminal possession alone, may wish to specify that such activity is one factor to be assessed along with others in determining whether confinement is justified. Many other possible dispositions--whether mandatory or discretionary--are conceivable; the important point is that unless the legislature specifies the disposition, the courts will of necessity perform that task, and in so doing they may achieve results at variance with unexpressed legislative intent.

MODIFYING THE CRIMINAL PROCESS: DETECTION AND POST-ARREST CONSEQUENCES

The selection of the appropriate post-conviction sanctions for least serious marijuana behavior does not exhaust the legislator's inquiry. The need to modify the criminal process (police behavior to detect offenses and arrest violators and post-arrest processing by police, prosecutors, and courts) in marijuana cases has been a crucial factor in movements for reform.

For those who seek mainly to reduce the amount of criminal justice resources in marijuana cases, the procedural payoff is really the crucial one. In addition, for those who believe that society's interests in suppressing marijuana use do not warrant the invasion of privacy and deprivation of liberty normally implicit in the criminal process, a central goal in decriminalization is to minimize the offender's involvement in the criminal justice system.

Thus, assuming that the legislature has decided to enact a decriminalization scheme which, at the least, removes incarceration as an authorized penalty for the least serious marijuana behavior, the following procedural questions must be addressed:

- How is the police search authority affected by decriminalization?
- Under what circumstances may a person be taken into custody and detained upon apprehension?
- May the offender be required to appear in court?
- If the case is contested, under what process and with what safeguards should be case be adjudicated?

These issues will be discussed from both constitutional and policy perspectives.

Detection and Arrest

The discussion of post-conviction consequences referred mainly to considerations of personal liberty, fairness, institutional integrity, and conservation of criminal justice resources. Another interest that may be important to legislators is protection of individual privacy. To policymakers concerned with privacy, the following discussion will be especially relevant.

Even if legislative reform prevents severe deprivations of liberty (such as imprisonment) from being inflicted on marijuana users after conviction, that group may still be subjected to serious invasions of privacy associated with arrest, detention, and search procedures. Obviously, the most effective way of protecting the privacy of the class of marijuana users whose activity is the subject of decriminalization is to remove all legal sanctions for possession of less than the designated amount. Although the marijuana itself would still be subject to seizure as contraband under both state and federal law, a state could still prohibit its own magistrates from issuing search warrants for the seizure of small quantities of marijuana, and the indignities associated with arrest and detention would be eliminated.

As noted above, however, legislators may believe that removal of all sanctions from consumption-related activity is inconsistent with society's interest in discouraging marijuana use and may therefore retain some civil penalty. Assuming that possession of small amounts, as well as other consumption-related activity, remains an offense punishable by a fine, protection of privacy can still be enhanced by enacting statutory provisions designed to discourage unnecessarily zealous and intrusive law enforcement efforts.

The decision to decrease the penalty for marijuana offenses may itself influence the police to place a lower priority on its detection and therefore have the effect of conserving police resources as well as protecting personal privacy. Aside from changes in the substantive offense, however, privacy can also be protected through limitations on the power of police to detain suspects and search property in connection with the enforcement of prohibitions of the least serious offenses. Naturally, the appropriate avenues of regulation are the authority of magistrates to issue search warrants and the authority of police to make arrests.

Limiting the Issuance of Search Warrants

Traditionally, a citizen's person and property cannot be searched against his will unless a search warrant, describing the place to be searched and the things to be seized, has been issued, "upon probable cause." When the "thing to be seized" is marijuana, the primary requirement for the issuance of a search warrant is a showing of "probable cause" that marijuana will be found in the place to be searched.

In addition, a warrantless search may be made, where probable cause exists to support the issuance of a warrant, if delay might well result in loss of the evidence (e.g., if the "things to be seized" are in a moving automobile).[54]

To protect the property of persons who commit decriminalized offenses from these kinds of searches, a provision such as the following could be enacted:

> A search warrant will not issue for the seizure of marijuana or of evidence in connection with a marijuana related offense, if the amount of marijuana to be seized is less than [the designated amount], or if the offense in question is [include reference to "least serious offenses"]. Furthermore, the presence on a person or premises of less than [the designated amount] of marijuana, or the commission of [include reference to "least serious offenses"], does not, in the absence of additional evidence of a substantial nature, constitute probable cause for the issuance of a search warrant authorizing the seizure of larger amounts of marijuana, or the seizure of evidence in connection with more serious marijuana-related offenses; nor shall it constitute reasonable grounds, for purposes of an arrest, to believe that any marijuana offense other than [include reference to "least serious offenses"] has been committed.

Note that such a provision applies to warrantless automobile searches as well as searches under warrant, because the legality of the former depends on the existence of "probable cause" for the issuance of a warrant, even though no warrant need be issued. The second sentence of the sample provision is designed to prevent searches and arrests in connection with more serious offenses from being made solely on the basis of evidence that the decriminalized offense was committed. This part of the provision is somewhat ambiguous, since it leaves open to case-by-case determination the question of how much additional evidence is needed. If additional protection is thought necessary, it can be achieved by prohibiting searches of private homes unless there is probable cause to believe that the home is used for the sale of marijuana. A similar provision was included in the National Prohibition Act of 1919.[55]

Arrests and Incidental Searches

Warrantless searches of an offender's person and the area under his immediate control can be conducted, "incident to a lawful arrest," to prevent him from either obtaining a weapon or destroying evidence while he is in custody.[56] To authorize a full search, the arrest must be based on probable cause, and it must be a "full-custody arrest." A full-custody arrest is apparently one that includes transportation to the stationhouse for booking or any equivalent prolonged contact with the suspect.[57]

Since police do not ordinarily have time to obtain a search warrant, they place great reliance on their authority to conduct searches incident to an arrest. In many jurisdictions, it is a matter of routine for the police to search a suspect when they arrest him, and it may even be required by departmental regulations.[58]

In this instance, because the authority to search depends on the fact of detention, protection of privacy and protection of liberty go hand in hand. Both may be protected by making "full-custody arrest" an inappropriate response to decriminalized offenses. A citation procedure (see below) may suffice for the apprehension of most offenders. Of course, there may be occasions when prolonged detention is unavoidable. But these occasions can be named as specific exceptions to the statutory rule that under normal circumstances an offender is not to be subjected to a "full-custody arrest" (in the light of the Robinson opinion, use of that term is advisable) and is not to be detained longer than is necessary for citation purposes. For example, if an offender has inadequate identification, it may be necessary either to transport him to a magistrate to post bond, or to detain him at the stationhouse until his identity has been established. Although neither of these procedures necessarily involves "booking" the offender, they probably amount to "arrests" for the purpose of authorizing a search, since they both require prolonged contact between officer and offender.[59] Since the occasions for such detention procedures and the searches incident to them cannot be eliminated, they could be held to a minimum and designated in the statute as exceptional situations.

Of course, the decision of whether an offender's identification is "adequate" must be left in most cases to the police officer's sound judgment. Once the legislature has made its judgment that marijuana offenders should not be routinely booked like other arrestees (and, by implication, subject to searches incident to "full custody arrests"), the police are unlikely to abuse their authority. If they do, however, constitutionally based remedies may be available. As far as the legal effect of the statute is concerned, it is quite possible that an arrest which, though based on probable cause, is unnecessary to ensure an appearance in court, is an "unreasonable seizure" under the Fourth Amendment.[60] Thus, police conduct that is clearly unreasonable under the circumstances may result in the suppression of evidence.

Custody After Arrest

If minor marijuana offenses are to be punishable by a fine, the apprehending officer must be authorized to detain the offender long enough to at least issue a citation that explains the options concerning paying or contesting the fine. The remaining question is whether any further custody should be authorized.

At one extreme, the statutory scheme could provide for "full custody," the marijuana offender being treated like any felon or misdemeanant who, upon apprehension, may be brought "downtown" to be fingerprinted, booked, and photographed. At the other end of the spectrum, the legislature might permit no intervention beyond the initial apprehension and issuance of a citation. Between these extremes lie a variety of options: there may be additional custody for the limited purpose of identification, full custody unless the defendant can post collateral, and discretion to invoke full custody if the defendant does not give adequate identification or has no local address.

Any of these options would probably withstand a constitutional challenge. At least two of the states which have adopted the Model Penal Code's "violation" concept nonetheless authorize arrest without a warrant and also permit custody when an offense is committed in an officer's presence.[61] Thus far no constitutional challenges have been brought. It is arguable, however, that a state may not deprive a person of liberty for committing an offense which is not defined as a crime and which has been destigmatized and is not punishable by a loss of liberty. One might rely, for example, on Supreme Court decisions holding summary seizure of property before an adjudication of liability to be a denial of due process.[62] That is, the due process notions which forbid a state from temporarily depriving a debtor of property to ensure his payment of his debt on that property should apply a fortiori when the state is attempting to enforce the payment of a purely civil fine through a deprivation of personal liberty. On the other hand, the court might conclude that the relatively minor deprivation of liberty occasioned by a full custody arrest is not, in itself, a denial of due process when the offense had been personally observed by the apprehending officer. The court might emphasize the state's interest in adopting procedures to ensure that its prohibitions--criminal or civil--are enforced, and the reasonableness of taking the defendant into custody to guarantee either his appearance at a subsequent trial or payment of a fine as a means to that end. (For example, juvenile proceedings are not denominated criminal and yet the power to take the juvenile offender into custody has never been questioned.)

Since the Supreme Court has never addressed this issue, a definitive answer cannot be given here. The important point to note is that authorizing full custody implicates values of constitutional dimension. This factor, when considered with others discussed below, may lead to the policy judgment that custody should not be authorized, irrespective of the merits of the constitutional challenge.

Whether the impetus for decriminalization is a belief in the unfairness of the present prohibitions, a cost-benefit analysis, or a combination of the two, mandating full custody for every offender apprehended may be inconsistent with the goals of decriminalization. Full custody exacts significant costs in police resources in terms of both processing the offender at the time of arrest and maintaining his records thereafter. Arrest and custody also serve as sanctions in themselves, regardless of the subsequent disposition of the case. The offender is subject to the potentially demeaning process of booking. Moreover, the formal record of his arrest as well as the greater notoriety occasioned by bringing the violator to the station also serve as informal punishments.

Thus, at least in the vast majority of cases, it may be that the most effective procedure would be to permit intervention only to the degree necessary to issue a citation. However, in some cases the officer, due to the failure of the defendant to provide either adequate identification or a local address, may be justifiably concerned that the defendant will neither appear in court nor pay the fine. In such cases, a policy of leaving the officer discretion to bring the defendant into custody seems warranted.

To be consistent with the twin goals of fairness and efficiency, the sole purpose of custody may be to obtain adequate identification. While the state admittedly has an interest in enforcing and collecting its civil penalties, it is doubtful that that need justifies further intervention. Once apprehended and identified, few individuals will later flee the jurisdiction to avoid going to court or paying a fine. This risk is too slight to justify an elaborate custody procedure, especially when it is recalled that this decriminalization scheme applies only to the least serious behavior in the first place.

Court Appearance

With respect to the question of whether the defendant should be required to appear in court, a number of alternatives are available. In decreasing order in terms of degree of intervention and cost, they are: mandatory court appearance; court appearance authorized, with discretion to be exercised by the arresting officer; posting of collateral which is forfeited if the defendant does not appear; and payment by mail.

To some, the appearance requirement may be regarded as a reasonable means of implementing the policy of discouraging use. Appearance in court imposes a greater burden on the offender than mere payment by mail and thus may impress upon him the relative seriousness of official disapprobation for his conduct. On the other hand, removing these minor offenses from already severely overloaded state court dockets is one reason behind the drive for reform. Whether the marginal deterrence to be derived from the court appearance is worth this extra cost in court time is an issue which policymakers will have to address.

In the interest of effecting some cost savings, policymakers may be tempted to give police discretion to require court appearance in certain instances. The problem with this approach is that meaningful standards may be difficult to frame (i.e., in the best interest of the offender, for those offenders who would benefit from further intervention, for past offenders?). Only in the case of the last standard will the scheme not introduce an additional potential for selective punishment. Absent such a clearly definable standard, policymakers would do well to either mandate court appearance in every instance or in none.

If the policymakers choose not to authorize court appearance at all, the choice between the final two alternatives is very likely one of little significance. When the scheme envisions posting collateral followed by forfeiture for nonappearance or mailing the fine, most defendants can be expected to forfeit the collateral or pay the fine rather than contest the charge. Requiring payment of collateral before release may result in a greater number of fines being paid. However, this procedure seems to impose unfair burdens on those offenders who do not carry sufficient money on their persons for that purpose. Moreover, payment of a fine may be encouraged by adopting a procedure which has been used in the collection of parking tickets: the fine is doubled if it is not paid or contested within a certain time following the violation, after which a civil proceeding may be brought to collect the judgment.

Adjudicatory Process

Legislative choices about appropriate adjudicatory procedures are tied closely to the post-conviction consequences discussed earlier. Once the criminal post-conviction consequences of a marijuana violation (stigma and incarceration) have been eliminated, most defendants will not contest their guilt by seeking to suppress the evidence or insisting on an evidentiary trial. Indeed, the defendant in such circumstances is not constitutionally entitled to the cumbersome and costly procedural safeguards designed to protect him against unwarranted "criminal" convictions. On the other hand, if a conviction can result in incarceration or stigma, defendants will be more likely to invoke procedural protections to which they are constitutionally entitled.

The range of legislative choice is thus fairly constricted. If the post-conviction consequences have been decriminalized, the legislature will undoubtedly wish to capture the cost savings by providing summary procedures, much like those at traffic court, or none at all. Neither prosecutors, criminal court judges, nor defense attorneys need to be involved. On the other hand, if the post-conviction consequences remain more or less criminal, then the legislature will have no choice but to utilize formal misdemeanor processes involving some prosecutorial official and probably defense attorneys as well.

Before addressing the available policy options, it will be useful to describe three constitutional propositions which establish the outer boundaries for procedural choices.

First, two key (and costly) procedural protections are required only if the offense is punishable by incarceration. Decisions like Argersinger v. Hamlin[63] and In re Gault[64] indicate that the right to a court-appointed attorney, which was first announced in Gideon v. Wainwright,[65] arises only in cases where incarceration is authorized. Therefore even if the offense is labelled a crime and has not been destigmatized, the state is not required by the Constitution to provide indigents with state-paid counsel, provided imprisonment is not authorized.[66] Similarly, the Court has also held that there is no right to jury trial if the potential sanction is imprisonment of less than 6 months[67] or a small money fine.[68]

Second, if the legislature reduces the penalty for the least serious marijuana behavior to a fine but retains the criminal label together with adverse record consequences, the state will have to establish some formal trial process, affording the defendant the right to confront adverse witnesses, the right not to have a verdict directed against him, and the right not to be tried for the same offense in another proceeding.[69] (The Court has never determined whether the accused must also be given the additional Sixth Amendment rights to a speedy trial and to compulsory process and the due process right to be tried under the "beyond a reasonable doubt" evidentiary standard.)

Third, the legislature can probably invoke summary procedures without most of these procedural rights by labelling the offense noncriminal and destigmatizing its record consequences. The Supreme Court would probably determine that the statute is not punitive,[70] in the sense that the "dominant purpose" of the statute, as derived from its legislative history or the severity of the fine,[71] is not to punish. One commentator has concluded, based upon his review of the relevant cases, that it is highly unlikely that the Court will decide that a civil money penalty is anything other than what it purports to be.[72] Even under summary civil[73] procedures, however, the defendant cannot be denied his Fifth Amendment right against self-incrimination.[74]

To summarize, if the legislature classifies the least serious marijuana offense as a civil violation, punishable only by a fine and without stigmatic record consequences, it may constitutionally provide only "summary" adjudication procedures; the defendant will not be entitled to have appointed counsel, to subpoena witnesses, to confront adverse witnesses, to put the state to a "criminal" burden of proof, or to be tried by a jury or legally trained judge.

It should be added, of course, that the absence of a constitutional entitlement does not imply that the legislature should, as a matter of policy, establish purely summary procedures. In some respects, this choice will depend on whether a summary (traffic) court system (separate from the misdemeanor court system) is already in place. If so, the legislature will undoubtedly want to expand that court's jurisdiction to cover these least serious marijuana offenses, according these defendants the same "rights" that traffic defendants have. On the other hand, if traffic cases are handled within the lower criminal court system, the accommodation between efficiency and procedural rights will be made as a matter of practice, just as it is in more or less serious traffic cases. If the legislature (or city council) has defined a separate, less formal set of procedures for petty traffic cases, it could simply enter a cross-reference in the decriminalization bill.

(This chapter was written primarily by Professor Richard J. Bonnie.)

FOOTNOTES

[1] "Commercial" activity refers only to transfers in which the transferor realizes a profit. It may be more appropriate to place casual, not-for-profit transfers in the same category as mere possessory activity.

[2] By increasing the prosecutor's leverage, this approach will probably conserve prosecutorial and judicial resources. However, it will do nothing to reduce the costs associated with police enforcement, since every possessor will remain a potential criminal. Moreover, this approach will not alleviate unfairness to possessors of marijuana who will never be sure whether they can rebut the presumption and thereby escape criminal liability.

[3] *Sharp* v. *Commonwealth*, 213 Va. 269, 192 S.E.2d 217 (1972).

[4] See *People* v. *Serra*, 55 Mich. App. 514, 223 N.W.2d 28 (1974). This case actually struck down a statute which only created a presumption with possession of more than 2 ounces. If such a statute violates the privilege against self-incrimination, then *a fortiori* a statute which creates the presumption upon possession of *any* amount would be held unconstitutional.

The self-incrimination holding was disavowed by the Michigan Supreme Court two years later; however, the alternative holding of *Serra* that the 2-ounce presumption violated due process because it lacked a rational basis remains intact. *People* v. *Gallagher*, 68 Mich. App. 63, 241 N.W.2d 759 (1976).

[5] *Cole* v. *State*, 511 P.2d 593 (Okla. Crim. App. 1973). This case struck down a statute which shifted the burden to the defendant to show a lawful purpose once the state had proven possession of paraphernalia. The logic is equally applicable regardless of whether the presumption relates to unlawful purpose or to intent to sell.

[6] Since this method does not involve presumptions of intent to sell, no constitutional challenge can be mounted on the basis of denial of either the privilege against self-incrimination or the presumption of innocence. Moreover, it has been held, on a substantive due process attack, that there is a rational basis for grading the seriousness of the offense according to the weight of the cannabis possessed. *See People* v. *Campbell*, 16 Ill. App. 3d 851, 307 N.E.2d 395 (1974); *People* v. *Kline*, 16 Ill. App. 3d 1017, 307 N.E.2d 398 (1974).

[7] See, e.g., *Stone* v. *State*, 254 Ark. 1011, 498 S.W.2d 634 (Ark. 1973); *State* v. *Garcia*, 16 N.C. App. 344, 192 S.E.2d 2 (1972); *Williams* v. *State*, 506 S.W.2d 193 (Tenn. Crim. App. 1973).

[8] *Sharp* v. *Commonwealth*, 213 Va. 269, 192 S.E.2d 217 (1972).

[9] *People* v. *Serra*, 55 Mich. App. 514, 223 N.W.2d 28 (1974).

[10] See also *Perry* v. *State*, 303 A.2d 658 (Del. 1973); but see *People* v. *Gallagher*, 68 Mich. App. 63, 241 N.W.2d 759 (1976), overruling the self-incrimination aspect of the *Serra* holding.

[11] Once again the burden of disproving intent to sell might be shifted to the defendant, and once again this alternative is subject to constitutional challenge.

[12] Goode, "Sociological Aspects of Marijuana Use," 4 *Contemporary Drug Problems* 397, 441 (1975).

[13] See National Commission on Marihuana and Drug Abuse, *Marihuana: A Signal of Misunderstanding*, Appendix Vol. II at 1171 (1972).

[14] California, Alaska, Oregon, South Carolina and Colorado.

[15] Maine and Minnesota.

[16] Telephone conversation with Dr. Robert Willette of the National Institute on Drug Abuse on October 15, 1976.

[17] *See* National Commission on Marihuana and Drug Abuse, *Marihuana: A Signal of Misunderstanding*, Appendix Vol. II at 1171 (1972).

[18] Goode, "Sociological Aspects of Marijuana Use," 4 *Contemporary Drug Problems* 397, 404 (1975). The author also notes that marijuana is almost never laced with more expensive and dangerous drugs, since these substances--mescaline and opium--are unprofitable to sell in this manner. *Id.* at 404-5.

[19] This does not imply that a potency distinction would necessarily be violative of due process; there are a small number of "strict liability" regulatory offenses for which the prosecution need not show *mens rea*.

[20] As alternatives, departments might pool their resources to establish a central lab, or the chemical evaluation could be done on the state level. There would be considerable expense both in terms of setting

up the apparatus and in terms of conducting each assay, regardless of which alternative was chosen.

[21] Telephone conversation with Dr. Robert Willette of the National Drug Institute on October 15, 1976. The DEA has found rare instances of compounds consisiting of up to 5 percent THC.

[22] National Commission on Marihuana and Drug Abuse, Marihuana: A Signal of Misunderstanding, Appendix Vol. II at 1173 (1972).

[23] See Goode, "Sociological Aspects of Marijuana Use," 4 Contemporary Drug Problems 397, 405 (1975).

[24] Oregon, Minnesota, California, Colorado, and Maine.

[25] Ravin v. State, 537 P.2d 494 (Alaska 1975).

[26] The Commission noted:

> With regard to the [decriminalization of] casual distribution of small amounts of marijuana for no remuneration or insignificant remuneration not involving a profit we are following the approach taken in the Comprehensive Drug Abuse Prevention and Control Act of 1970 which in essence treats such casual transfers as the functional equivalent of possession. In doing so, Congress recognized that marijuana is generally shared among friends and that not all people who distribute marijuana are "pushers."
>
> The accuracy of Congress' appraisal is underscored by the National Survey. When people who had used marijuana were asked how they first obtained the drug, 61 percent of the adults and 76 percent of the youth responded that it had been given to them. Only 4 percent of the adults and 8 percent of the youth said that they had bought it. When asked who their source had been, 67 percent of the adults and 85 percent of the youth responded that it had been a friend, acquaintance, or family member.

National Commission on Marihuana and Drug Abuse, Marihuana: A Signal of Misunderstanding, pp. 157-58 (1972).

[27] The proof problems associated with a profit-nonprofit distinction can cut both ways. If the burden is on the prosecution to prove that a sale resulted in a profit, conviction of commercial dealers becomes that

much more difficult; on the other hand, if the burden is on the defendant to prove that the sale was not for profit, it becomes more difficult for "accommodating" users to reap the benefits of decriminalization.

[28] This view was taken by Senators Javits and Hughes, who, as members of the National Commission on Marihuana and Drug Abuse, unsuccessfully urged the Commission to recommend withdrawal of the criminal sanction from all nonprofit transfers; instead, the commission limited its recommendation to the "distribution of small amounts for insignificant remuneration." National Commission on Marihuana and Drug Abuse, *Marihuana: A Signal of Misunderstanding*, pp. 154-156 (1972).

[29] Cultivation in these circumstances would be entitled to some measure of protection from confiscation under the Fourth Amendment, and could obtain additional protection from decriminalization provisions designed to protect privacy.

[30] Kadish, "The Crisis of Overcriminalization," 374 *Annals* 157 (1967).

[31] See Eichman, *Impact of the Gideon Decision Upon Crime and Sentencing in Florida: A Study of Recidivism and Socio-Cultural Change*, Florida Div. of Corrections: Research and Statistics Section, Research Monograph No. 2, pp. 71-73 (1966).

[32] National Advisory Commission on Criminal Justice Standards and Goals, *Task Force on Corrections*, 159 (1973).

[33] Bonnie & Whitebread, *The Marihuana Conviction*, 239 (1974).

[34] See generally Bonnie & Whitebread, *The Marihuana Conviction*, 237-247 (1974); see also Project, "The Consenting Adult Homosexual and the Law: An Empirical Study of Enforcement in Los Angeles County," 13 *UCLA L. Rev.* 643 (1966).

[35] Kadish, "The Crisis of Overcriminalization," 374 *Annals* 157 (1967).

[36] National Advisory Commission on Criminal Justice Standards and Goals, *Criminal Justice System*, 177-178 (1973).

[37] Packer, *The Limits of the Criminal Sanction*, 261 (1968).

[38] American Law Institute, Model Penal Code Tentative Draft #2, Commentary to § 1.05, p. 9 (1954).

[39] E.g., Cal. Penal Code §§ 16, 19(c) (1968 Supp.); Colo. Rev. Stat. §§ 18-1-104, 107 (1973); Del. Code Ann. 11 §§ 4203, 4207 (Rev. 1974); Ill. Ann. Stat. 38 §§ 1005-1-15, 17 (1973); Ohio Rev. Code Ann. § 2901.02(G) (1975 Repl. Vol.).

[40] Tate v. Short, 401 U.S. 395 (1971).

[41] Argersinger v. Hamlin, 407 U.S. 25 (1972); Goldberg v. Kelly, 397 U.S. 254 (1970); Abbit v. Bernier, 387 F. Supp. 57 (D. Conn. 1974) (three-judge court).

[42] Tucker v. City of Montgomery Bd. of Commissioners, 410 F. Supp. 494, 510 (M.D. Ala. 1976) (three-judge court).

[43] Commonwealth ex rel. Parrish v. Cliff, 451 Pa. 427, 304 A.2d 158 (1973); State ex rel. Pedersen v. Blessinger, 56 Wis.2d 286, 201 N.W.2d 778 (1972).

[44] Hendrix v. Lark, 482 S.W.2d 427, 430 (Mo. 1972); see also A.B.A., Standards Relating to Sentencing Alternatives and Procedures, with Commentary, Sec. 6.5(b), pp. 288-289.

[45] State v. DeBonis, 58 N.J. 182, 198-199, 276 A.2d 137, 146-147 (N.J. 1971).

[46] Appointed counsel would not be mandated as a constitutional matter if imprisonment were not authorized. See Argersinger v. Hamlin, 407 U.S. 25 (1972). However, legislators may decide that indigent defendants who are subject to criminal liability in all fairness should have appointed counsel available to them.

[47] In California if the person charged with possession of up to 1 ounce was previously convicted of this offense three times within a 2-year period, he will be diverted to an educational or treatment program in lieu of a fine.

[48] There should be no constitutional obstacle to a state imposing, with respect to use of marijuana, different restrictions on juveniles than on adults. In the obscenity cases, where the fundamental values of the First Amendment are at stake, it has been suggested that the state has a "legitimate interest in preventing exposure of juveniles to obscene material . . ." Paris Adult Theatre I v. Slaton, 413 U.S. 49, 58 n. 7 (1973). A fortiori in the regulation of marijuana, where the First Amendment is not at issue, there should be no objection to imposing different standards for juveniles.

[49] See Paulsen and Whitebread, *Juvenile Law and Procedure* (1974) at 32.

[50] This was done in Ohio, California, and Minnesota.

[51] New Jersey Stat. Ann. § 2A: 4-14(m) (1952). This statute was held not violative of due process when it was challenged on grounds of vagueness. *State* v. *L. N.*, 109 N.J. Super. 278, 263 A.2d 150 (1970), *aff'd* 57 N.J. 165, 270 A.2d 409 (1970), *cert. den.*, 402 U.S. 1009 (1971). Moreover, most statutes of this kind have survived due process attacks. See Paulsen and Whitebread, *Juvenile Law and Procedure* (1974) at 48-49.

[52] California Welfare and Institutions Code, § 600-602 (Supp. 1976).

[53] By the same token, should the legislature wish to remove noncriminal possession from the jurisdiction of the juvenile courts, this intention should also be made clear on the face of the statute.

[54] *Carroll* v. *United States*, 267 U.S. 132 (1925).

[55] 27 U.S.C.A. § 39 (West, ed. 1927).

[56] *Chimel* v. *California*, 395 U.S. 752 (1969).

[57] *United States* v. *Robinson*, 414 U.S. 218 (1973).

[58] LaFave, "'Case-by-Case Adjudication' Versus 'Standardized Procedures': The Robinson Dilemma," 1974 *Supreme Court Review* 127, 131; A.L.I., *Model Code of Pre-Arraignment Procedure* 493 (1975).

[59] The *Robinson* opinion, which gave the police authority to conduct a full personal search whenever they make a "full-custody" arrest, did not define that term, and the case itself involved an arrest plus "booking"; however, as the decision was rationalized as necessary in order to protect policemen, during prolonged contact with a suspect, from attack with any hidden weapon that the suspect might have, it seems clear, at least, that a search incident to any form of detention that requires the policeman to drive the suspect somewhere in his squad car will be upheld as reasonable. *United States* v. *Robinson*, 414 U.S. 218, 221-23, n. 2; LaFave, *supra*, at 148, 152.

[60] The Ninth Circuit has held unconstitutional the arrest of a material witness and the forcible stop of a person wanted for questioning, where they were unnecessary to secure the cooperation of the subjects. *Bacon* v. *United States*, 449 F.2d 933 (1971); *United States* v. *Ward*,

488 F.2d 162 (1973). On the possibility that unnecessary arrests for traffic violations and the like may violate the Fourth Amendment, see Mr. Justice Stewart's concurring opinion in *Gustafson* v. *Florida*, 414 U.S. 260, 266-67 (1973); see also LaFave, *supra*, at 158-161.

[61] Conn. Stat. Ann. § 6-49 (1972); Minn. Stat. Ann. § 629.34 (1947).

[62] See, e.g., *Fuentes* v. *Shevin*, 407 U.S. 67 (1972); *Mitchell* v. *W. T. Grant*, 416 U.S. 600 (1974); *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337 (1969); *North Georgia Finishing, Inc.* v. *Di-Chem, Inc.*, 419 U.S. 601 (1975).

[63] 407 U.S. 25 (1972).

[64] 387 U.S. 1 (1967).

[65] 372 U.S. 355 (1963).

[66] Conversely the state must provide counsel to indigents if incarceration is authorized, even if the offense is not a "crime." It must be noted that if the fine authorized is very substantial the Court could well decide that state-paid counsel is required.

[67] *Baldwin* v. *New York* 399 U.S. 66 (1970).

[68] *Muniz* v. *Hoffman*, 422 U.S. 454 (1975). The Court there specifically reserved the question whether a severe fine might require jury trial. *Id.* at 477.

[69] See Clark, "Civil and Criminal Penalties and Forfeitures: A Framework for Constitutional Analysis," 60 *Minn. L. Rev.* 379, 398 (1976).

[70] *Id.* at 382-384, 394-396, 401-403.

[71] But cf. *Muniz* v. *Hoffman*, 422 U.S. 454 (1975) ($10,000 fine on union a petty sanction for purposes of Sixth Amendment right to jury trial, absent contrary expression of congressional intent).

[72] Clark, "Civil and Criminal Penalties and Forfeitures: A Framework for Constitutional Analysis," 60 *Minn. L. Rev.* 379, 411 (1976).

[73] See *Spevack* v. *Klein*, 385 U.S. 511 (1967) (revocation of professional license); *Uniformed Sanitation Men Ass'n* v. *Commissioner*, 392 U.S. 280 (1968) (loss of public employment); *Lefkowitz* v. *Turley*, 414 U.S. 70 (1973) (loss of government contract).

[74] Helvering v. Mitchell, 303 U. S. 391, 400 n. 3 (1938) (quoting United States v. Regan, 232 U. S. 37, 50 (1914)).

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